IN THE

Supreme Court of the United States

October Term, 1976

No. 76-71

LOS ANGELES TIMES, a division of THE TIMES MIRROR COMPANY, PAUL CONRAD, THE TIMES MIRROR COMPANY, a corporation, OTIS CHANDLER, ANTHONY DAY,

Petitioners,

vs.

FRED L. HARTLEY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of California.

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This is a libel action involving public figures and matters of public interest. Pursuant to Supreme Court Rule 19, petitioners pray for a writ of certiorari to review a decision of the California Court of Appeal, Second Appellate District, which reversed a summary judgment in their favor. The California Supreme Court denied a hearing of this matter on April 22, 1976.

Opinions Below.

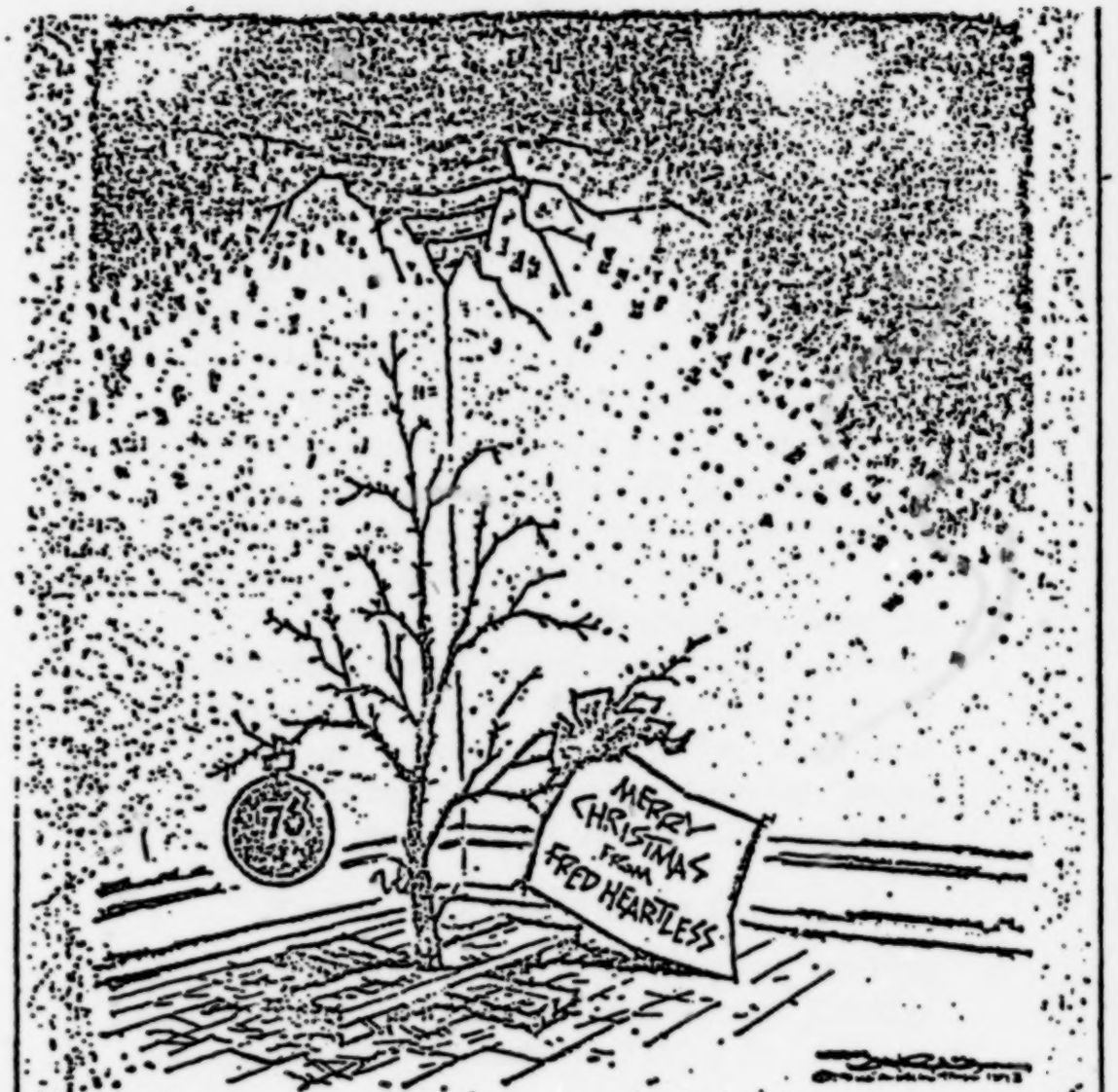
The opinion of the California Court of Appeal is attached as Appendix A. The order of the California Supreme Court denying a hearing of petitioners' petition from the adverse decision of the California Court of Appeal is attached as Appendix B.

Jurisdiction.

On February 3, 1976, the California Court of Appeal entered its opinion reversing the trial court's order of summary judgment for petitioners. On April 22, 1976, the California Supreme Court denied petitioners' petition for hearing from the adverse decision of the California Court of Appeal. This petition for writ of certiorari is therefore timely under 28 U.S.C. § 2101 (c). The Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) and in accordance with Supreme Court Rule 19.

Questions Presented.

At the height of the fuel and energy crisis in December, 1973, the federal government ordered the diversion to Guam of a Union Oil Company of California ("Union") tanker carrying low sulphur oil bound for the Los Angeles Department of Water and Power. On December 20, 1973, petitioner Los Angeles Times ("The Times") published an editorial cartoon (see opposite page) expressing an opinion sharply critical of the apparent indifference of Union and respondent Fred L. Hartley, Union's president ("Hartley"), to the plight of Los Angeles, created by the diversion of the tanker and their unexplained failure to take any steps to mitigate the loss suffered by Los Angeles as a result of the diversion. Union and Hartley sued for libel. The trial court ruled that Hartley and Union were public figures and granted petitioners a summary judgment on the principles set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). The California Court of Appeal reversed, and the California Supreme Court denied a hearing.



Federal government diverts 500,000 barrels of Union crude oil from Southern California to Guam.—News item

The questions presented on this Petition for a Writ of Certiorari to the California Supreme Court are:

(1) Was the standard applied by the California Court of Appeal of a "possible" defamatory meaning to the editorial cartoon constitutionally permissible, in view of this Court's decisions in *Greenbelt Coop. Pub. Ass'n v. Bresler,* 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970); and *Old Dominion Branch No. 496 v. Austin,* 418 U.S. 264, 41 L. Ed. 2d 745, 94 S. Ct. 2770 (1974)?

(2) Was it constitutionally permissible for the California Court of Appeal to shift the burden of proof of "actual malice" to petitioners in a libel action assumed by that court to involve public figures and matters of public interest?

(3) Was it constitutionally permissible for the California Court of Appeal to reverse the summary judgment and thereby subject petitioners to the burden and expense of a jury trial when there was no defamation and no evidence of "actual malice" in the *New York Times v. Sullivan* sense?

Constitutional Provisions Involved.

The constitutional provisions involved are the First and Fourteenth Amendments, United States Constitution, Amendment I, Amendment XIV, § 1:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (U.S. Const., amend. I.)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., amend. XIV, § 1.)

Statement of the Case.

On March 27, 1974, Hartley and Union as plaintiffs filed a complaint for libel in the Los A geles Superior Court against petitioners The Times, The Times Mirror Company, Otis Chandler, Anthony Day and Paul Conrad. The Times is a newspaper division of petitioner The Times Mirror Company. Chandler is the publisher of The Times; Conrad is one of its cartoonists; and Day is editor of The Times editorial pages. The complaint alleged that the editorial cartoon published on December 20, 1973 was defamatory as to Hartley and Union.

After the action was at issue, petitioners moved for a summary judgment on the grounds that the cartoon was constitutionally protected under *New York Times Co. v. Sullivan,* 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) and successor cases and that the cartoon was not defamatory. Their moving papers in support of that motion showed the following facts.

The fuel and energy crisis had been developing for some years but became acute at the time of the

Yom Kippur War in October, 1973 and the subsequent Arab oil embargo. In late 1973 the crisis was of utmost public concern in Los Angeles; it dominated the local news since it posed the real threat that in a short time Los Angeles would be without energy. It was one of the two most prominent news stories of the day, rivaling Watergate in coverage.

The cartoon in question commented upon the plight of Los Angeles caused by the federal government's diversion to Guam of a Union tanker bound for the Los Angeles Department of Water & Power ("DWP") with 500,000 barrels of low sulphur fuel and the position of Union and Hartley in connection with the diversion. The events which provided the context for the cartoon and Hartley's participation in them were as follows.

Since 1964 Hartley has been the president of Union, one of the largest oil companies in the United States and at the time of the cartoon the fifth largest industrial concern headquartered in California. [C.T. 244.]* In that position, Hartley made public appearances and public statements defending or supporting Union's position in a myriad of matters. He was outspoken on numerous subjects of public interest and his views were reported in newspaper and television broadcasts. Hartley rose to national prominence in 1969 during the Santa Barbara channel oil spill and the ensuing debate thereon. His famous remarks about the plight of birds affected by the oil spill were widely quoted (and mis-quoted) in news media across the nation.

*References herein to the Clerk's Transcript before the California Court of Appeal, containing the pleadings, affidavits and exhibits thereto before the trial court, are shown as "C.T." A copy of such transcript has been furnished to this Court pursuant to Supreme Court Rule 21.

[C.T. 119, *et seq.*] Subsequent to the channel oil spill, Hartley regularly expressed his views on such varied subjects as the propriety of additional drilling in the Santa Barbara channel (The Times, January 1, 1970); smog prevention (The Times, April 30, May 7, 1970); inflation (The Times, December 10, 1970); gasoline to meet EPA emission requirements (The Times, October 7, 1972); and smog and federal emission standards (The Times, March 27, 1972). [C.T. 110, *et seq.*]

Hartley became involved publicly with the fuel crisis as early as May, 1973. At that time, he told Union shareholders that the gravest problem then facing our country was the energy crisis. At a California Assembly Transportation Committee hearing in June, 1973, Hartley and other oil executives warned that the fuel crisis was very real. They assured the committee that public agencies would be supplied with fuel by the companies with whom they had previously done business. And in October, 1973, at a Rotary Club meeting in Southern California, Hartley expressed his view that the energy and fuel crisis was one of consumption, not production. [C.T. 122.]

As the fuel crisis reached its peak in Los Angeles in December, 1973, Hartley became more involved and volunteered numerous possible solutions. Reacting to a suggestion of the Ad Hoc Energy Conservation Committee of a 25% reduction in consumption by Los Angeles users, Hartley testified that such a reduction would force Los Angeles refineries to shut down. He suggested, as alternatives for saving energy, the closing of shopping centers one day a week, eliminating the Sunday edition of The Times and cancelling some radio and television programs. [C.T. 96.]

Hartley's voice, although prominent, was not the only one warning of the impending fuel crisis. As early as April, 1973, DWP spokesmen warned of the critical energy shortage in Los Angeles. [C.T. 75, 79.] The situation became more acute at the time of the Arab oil embargo. Public agencies in Los Angeles recommended both voluntary and compulsory energy curtailment programs, including suggestions of "rolling blackouts" and limitations on the length of the work week. [C.T. 83-93.] An Emergency Energy Committee, formed by the Los Angeles City Council, recommended on December 13, 1973 that there be cuts of 10 to 33 percent in electricity consumption. [C.T. 94-105.]

In the midst of this crisis the subject of the diversion of the tanker was raised by Hartley on December 17, 1973. At a meeting of the Emergency Energy Committee and local oil executives, Hartley revealed that 500,000 barrels of Union low sulphur oil which were supposed to go to DWP as a part of its January shipments had been diverted to Guam by the federal government. In response, a DWP spokesman stated that unless the situation changed rapidly, only one-half of the oil necessary for it to operate would be available by March or April, 1974. [C.T. 106.] An article appearing in The Times on December 19, 1973 stated that much confusion concerning the diversion of the tanker existed, that Union had said it was not going to spread this loss among all of its customers, and that only DWP would be affected. Union's position was that it had not been a "traditional" supplier to DWP for fuel, a statement contradicted by DWP. The article further stated that The Times had tried to contact Hartley regarding this matter but was told

by Union officials that he was too busy with other matters to discuss this situation. [C.T. 108.] In an editorial appearing on the same day, December 19, 1973, The Times questioned why DWP had to bear the total burden of the diversion. [C.T. 107.]

So at a time when critical conservation measures were being implemented in Los Angeles and at a time when the citizens and business community of Los Angeles found themselves in the grip of an emergency generated by the energy crisis, 500,000 barrels of oil were diverted from the City. Thus, a serious question concerning the diversion was raised as to why DWP was the only customer of Union to suffer as a result of the government order.

Union's response was that it was not a "traditional" supplier to DWP. [C.T. 108.] But the same news story [C.T. 108] reported that a DWP spokesman told The Times that Union had supplied oil to DWP "many times in the past." It further appeared that Union need not have taken this precipitous action at the expense of the Los Angeles consumers. The federal order suggested use of a tanker bound from Alaska for the diversion to Guam, but Union elected to use the tanker bound from Indonesia since it was closer to Guam. [C.T. 108.]

It was in the context of this background and the public controversy engendered by Hartley's and Union's statements (and failures to make statements) that the cartoon appeared on December 20, 1973. It expressed an opinion sharply critical of Union's and Hartley's apparent indifference to the plight of Los Angeles, as evidenced by their apparent willingness to allow the entire brunt of the diversion to fall on Los Angeles.

On the above uncontradicted factual showing, the Los Angeles Superior Court granted petitioners' Motion for Summary Judgment. It ruled that Hartley and Union were "public figures", that the cartoon was constitutionally protected under the First Amendment, that there was no evidence of petitioners' alleged "actual malice", and that the cartoon was not defamatory. Hartley appealed, but Union did not and the judgment against Union became final.

The California Court of Appeal reversed, erroneously holding that the cartoon was defamatory since, according to the court, a "possible implication" of the cartoon was that it accused Union and Hartley of causing the diversion.* The Court also held that petitioners had the burden of disproving "actual malice" in the *New York Times v. Sullivan* sense. (Appendix A, pp. 8-9.)

*The court correctly rejected Hartley's claim that the appellation "Fred Heartless" was defamatory. Appendix A, p. 4.

REASONS FOR GRANTING THE WRIT.

The cartoon in question was an expression of opinion about public figures on a matter of vital public interest and concern. It was made at a time when the subject matter thereof, *viz.*, the federal government's diversion of the tanker and Union and Hartley's indifference with respect thereto, presented Los Angeles with its gravest crisis in recent history. Since the cartoon expresses only opinion, it is constitutionally protected under numerous decisions of this Court, including *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 41 L. Ed. 2d 745, 94 S. Ct. 2770 (1974); and *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970). (See Point I, below.)

The Court of Appeal compounded its error by placing upon petitioners the constitutionally impermissible burden of proving that they did not act with "actual malice" in making the alleged defamatory statement which the Court said was a "possible" implication to be drawn from the cartoon. (See Point II, below.)

Finally, by reversing the summary judgment in petitioners' favor, the California Court of Appeal imposed upon petitioners the burden and great expense of a jury trial in a case which concededly involves public figures and matters of public interest, in which there was no defamatory statement and in which the plaintiff made no showing of "actual malice" on the part of petitioners. (See Point II, below.)

The courts of California cannot be permitted to apply these constitutionally impermissible standards to

political cartoons which express opinions critical of public figures on issues of serious public concern. If allowed, and if summary judgment in such cases is not required, the very purpose of the *New York Times v. Sullivan* rule to promote open, uninhibited and robust debate and criticism will be rendered meaningless.

POINT I.

The Court of Appeal Committed Error of Constitutional Magnitude by Failing to Apply Those Standards Enunciated by This Court to Determine Whether a Publication Is Defamatory.

A. Hartley and Union Are Public Figures.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974), this Court defined two categories of "public figures." The first category includes those who are "public figures" because of their general prominence:

> "For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." (418 U.S. at 345, 41 L. Ed. 2d at 808.)

The second category includes those who are public figures because of their direct connection with a particular issue of public interest and concern:

> "It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." (418 U.S. at 352, 41 L. Ed. 2d at 812.)

Union conceded *sub silentio* in the trial court that it was a "public figure" and its failure to appeal confirms that position. As to Hartley, the trial court ruled that he was a public figure and the Court of Appeal correctly assumed for the purposes of its decision that he was such. (Appendix A, p. 8.) In support of that ruling, petitioners point to the above undisputed facts, including Hartley's presidency of one of this nation's largest oil corporations, all of which show his general, continuing prominence in the community. [C.T. 96, 110, 119.] This satisfied the first, or general renown category of *Gertz*.

With respect to the second category suggested by *Gertz*, Hartley's "participation in the particular controversy" which gave rise to the alleged defamation was direct and continuing. The "particular controversy" was the energy crisis affecting Los Angeles, specifically the diversion of the oil tanker from Los Angeles and Union's and Hartley's apparent decision to let the brunt of the diversion fall on Los Angeles. This was one of the most important news stories in Los Angeles at the time and Hartley was a central participant in that controversy.

In both of the above respects, general renown and participation in the particular controversy, Hartley is different from the plaintiffs in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974) and *Time, Inc. v. Firestone*, ... U.S. ....., 47 L. Ed. 2d 154, 96 S. Ct. ..... (1976). Unlike *Gertz*, Hartley was not dragged into a controversy with which he had only a remote connection. He was a direct and leading participant in the controversy and, with Union, a cause thereof due to the decision to let the onus of the diversion fall on Los

Angeles. It was Hartley's voluntary actions and statements that thrust his personality and that of Union "into the 'vortex' of an important public controversy." [*Cf. Associated Press v. Walker*, 388 U.S. 130, 155, 18 L. Ed. 2d 1094, 1111, 87 S. Ct. 1975, 1991 (1967).]

And unlike plaintiff Firestone, Hartley was not involved in that which this Court found was essentially a private matter in which no legitimate public interest could be found. It is difficult to think of a situation which aroused more concern in Los Angeles in the latter part of 1973 than the fuel and energy crisis which had been growing for a substantial period of time, was exacerbated by the Yom Kippur War and the Arab oil embargo, and then further intensified by the federal government's diversion of the tanker. The public nature of this matter bears no similarity to the subject of the marital travails of Mr. and Mrs. Firestone. As the Court noted in *Firestone*, (47 L. Ed. 2d at 163):

> "Dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in Gertz, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public."

B. The Cartoon Involves Only Opinion on Public Figures on Matters of Serious Public Interest and Is Therefore Constitutionally Protected Under New York Times v. Sullivan and Its Progeny.

Apart from the admittedly true caption stating that the federal government ordered the diversion of the tanker, the cartoon contains no statements of fact. Its content is limited to an opinion critical of the

attitude, actions, and failure to act of Union and Hartley in relation to the federal diversion, which at that time was of utmost public concern. Statements of opinion, albeit critical in nature, about public figures on matters of public interest, are constitutionally protected under *New York Times v. Sullivan* and its progeny.*

The cartoon in question is a prime example of the venerable art of political criticism and opinion by graphic depiction. There are several essential features to this art. The serious cartoonist is attempting to make a significant statement about the events of his day by means of one picture and a single caption. This requires a telescoping of concepts whereby a complex series of events, and a comment with respect to them, is conveyed at a glance. Political cartooning also involves the use of symbols, which are a shorthand for the convenience not only of the cartoonist but for the viewer as well. By means of a caricature of the events or persons depicted, the drawing attempts to capture the essence of the situation.

In this case the cartoonist desired to express an opinion concerning a matter of critical importance to the citizens of Southern California, namely, the fuel shortage and energy crisis. [C.T. 127.] He also wanted to express an opinion that was critical of Hartley's and Union's apparent indifference to the critical situa-

*Even if this were a common law defamation case, the expressions of opinion contained therein would not be actionable under state law. *Miller v. Bakersfield News-Bulletin, Inc.*, 44 Cal. App. 3d 899, 119 Cal. Rptr. 92 (1975); *Scott v. McDonnell Douglas Corp.*, 37 Cal. App. 3d 277, 112 Cal. Rptr. 609 (1974); *Correia v. Santos*, 191 Cal. App. 2d 844, 13 Cal. Rptr. 132 (1961, hearing denied); *Taylor v. Lewis*, 132 Cal. App. 381, 22 P.2d 569 (1933); *Eva v. Smith*, 89 Cal. App. 324, 264 Pac. 803 (1928); *Cowan v. Time, Inc.*, 245 N.Y.S. 2d 723 (1963).

tion created by the diversion of the tanker and their unexplained failure to take any steps to mitigate the loss suffered by Los Angeles as a result of the diversion. [C.T. 127.] The cartoonist did so by portraying a barren room with a withered Christmas tree, devoid of decoration save one hanging ornament. [C.T. 127.] By a single drawing with a terse caption, a caustic, biting comment was made with regard to the actions of Hartley and Union during the heart of the energy crisis. The cartoon was published just five days prior to Christmas. The usual festive air of the holidays had been dampened by a concern for conservation of fuel and the imposition of measures designed to conserve energy. Boulevards normally decorated with Christmas lights were dark. The public was exhorted to minimize or eliminate its use of Christmas decorations. In short, on December 20, 1973 the public could readily associate the energy crisis with a barren, lightless tree.

As a matter of constitutional law, an expression of opinion such as this cartoon is not actionable. In *Gertz*, this Court held that:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (418 U.S. at 339-340, 41 L. Ed. 2d at 805.)

In *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 41 L. Ed. 2d 745, 94 S. Ct. 2770 (1974), a companion decision to *Gertz*, plaintiffs were accused in the course of a labor dispute of having "rotten principles," lacking "character" and of being "traitors."

In reversing a libel judgment for plaintiffs, this Court held:

> "Before the test of reckless or knowing falsity can be met, there must be a false statement of fact. Gertz v. Robert Welch, Inc. . . . But, in our view, the only factual statement in the disputed publication is the claim that appellees were scabs, that is, that they had refused to join the union.
>
> "The . . . use of words like 'traitor' cannot be construed as representations of fact. As the Court said long before Linn, in reversing a state court injunction of union picketing, 'to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like "unfair" or "fascist —is not to falsify facts.' (Citation). Such words were obviously used herein in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. Expression of such an opinion, even in the most pejorative terms, is protected under federal labor law. Here, too, 'there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.' Gertz v. Robert Welch, Inc." (418 U.S. at 284, 41 L. Ed. 2d at 761-762.)

Greenbelt Coop. Pub. Ass'n v. Bresler, 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970) is directly in point. There the defendant newspaper commented and reported on plaintiff's negotiating position at a city council meeting on zoning as being "blackmail."

In reversing a jury verdict for plaintiff, this Court held that the references to "blackmail" were not defamatory, stating:

> "It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. . . .
>
> "To permit the infliction of financial liability upon the petitioners for publishing these two news articles would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments." (398 U.S. at 14, 26 L. Ed. 2d at 15.)*

The above decisions hold that expressions of opinion are not actionable when they involve public issues and public figures. In *Greenbelt* this Court held that the plaintiff was not accused literally of being a blackmailer. And in this case it is only by a strained interpretation of the cartoon that Hartley and Union could claim that it accused them of being responsible for the diversion of the tanker. The only "fact" stated

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*For a California Court of Appeal decision in accord with *Greenbelt,* see *Yorty v. Chandler,* 13 Cal. App. 3d 467, 91 Cal. Rptr. 709 (1970).

in the cartoon was the caption. Hartley and Union made no showing that the statement that the federal government ordered the diversion of the oil tanker was false. No such showing could have been made because the caption was factually accurate in all respects. To conclude, as the Court of Appeal did, that the cartoon charged Hartley and Union with the diversion of the tanker is to take the cartoon and stand it on its head.*

In the decision herein the Court of Appeal engaged in tortured and convoluted syllogism to reach the untenable conclusion that the cartoon accused Hartley and Union of having some causal relationship to the federal diversion order. As conceded by the Court of Appeal, this conclusion could not have been reached by anyone familiar with the fuel and energy crisis which existed at the time the cartoon was published. (Appendix A, p. 5.) But contrary to the holding

*The Court of Appeal misapplied *MacLeod v. Tribune Publishing Company, Inc.*, 52 Cal. 2d 536, 343 P. 2d 36 (1959) in formulating the bizarre rule that the standard for determining defamation was whether the cartoon contained a "possible implication" of a defamatory meaning when viewed by the eyes of the average reader. (Appendix A, p. 8.)

MacLeod, decided five years before *New York Times v. Sullivan*, imposed no such standard of a "possible implication" or possible defamatory meaning. In *MacLeod* the sting of the alleged libel was that the Peoples World, a communist line newspaper, endorsed plaintiff for an election, and that therefore plaintiff was a communist sympathizer or fellow traveler. (p. 544.) The defense was that there was an "innocent meaning" to the alleged defamation, *i.e.*, that communist support does not necessarily reflect communist sympathy on the part of the person supported. (p. 548.) In rejecting that "innocent meaning" defense, the *MacLeod* Court did not mandate a "possible" defamatory meaning test. It intended only to do away with what it called a "hair splitting analysis" and to prevent a clever defamer from casting grossly defamatory charges in ambiguous language. *MacLeod* held that such analysis has no place in the law of defamation ". . . dealing as it does with the impact of communications between ordinary human beings". (p. 550.)

of *Greenbelt*, the Court of Appeal assumed a special class of uninformed readers against whom the impact of the cartoon was to be measured. (Appendix A, pp. 6-7.) Such persons presumably were unaware of the fuel and energy crisis in the latter part of 1973, including waiting lines for gasoline, admonitions against Christmas lights, threats of shortened business hours, the diversion by the government of the tanker with needed fuel oil, etc. Petitioners suggest that such persons (if there were any) would not be ordinary human beings whose reactions should be measured in order to determine whether a publication is defamatory.

It is hard to conceive of any language which is critical in nature that could not have a "possible" defamatory meaning to some person. This is particularly true when dealing in the area of matters of public interest and public figures. This is the exact holding of *Greenbelt* discussed above. There the term "blackmail" was used with reference to the plaintiff. Surely, if there were some who read the news story and did not know of the public controversy, they might assume that the plaintiff was being charged with the crime of extortion. But this Court would not permit such a "possible" meaning or interpretation to stand. It held:

> ". . . even the most *careless* reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. . . ." (398 U.S. at 14, 26 L. Ed. 2d at 15; emphasis added.)

Petitioners submit that if the "careless" reader in *Greenbelt* would not have believed that there was a defama-

tion, then the hypothetical, uninformed reader in the Court of Appeal's opinion would not have so believed.

The law does not require that a court measure the alleged defamatory effect of a publication only upon the uninformed, or unknowing or careless reader. It is to measure its impact upon "ordinary human beings." (*Cf. MacLeod, supra,* 52 Cal.2d at 550.) There is no controversy in this case as to the public furor raised over the diversion of the tanker and the resultant crisis in Los Angeles. Hence there was no reason for the Court of Appeal to (1) hypothesize that there were a number of readers who were oblivious to what was happening around them, and (2) measure a "possible" defamatory effect of the cartoon only upon such readers. Further, even if there were such readers, there was no reason for the Court of Appeal to speculate that such readers would assume a dark purpose on the part of Hartley and Union, or that such readers would assume that Hartley and Union had the power to cause the federal government to do that which the caption said the federal government did. But even if the cartoon was susceptible to an interpretation that in some unexplained way Hartley and Union were connected with the diversion order, the underlying essence of the cartoon is opinion, not a representation of fact.

Under federal constitutional principles, a "possible" defamatory meaning is not permissible as a standard to compel petitioners to be held to trial. The result of the Court of Appeal's decision is to place upon petitioners the difficult and constitutionally impermissible burden of proving at trial what a hypothesized, uninformed group of people did or did not know about one of the gravest moments in recent history.

As conceded by the Court of Appeal, and as is obvious from a reading of the cartoon itself, no reasonably informed reader could have believed other than that the federal government was responsible for the diversion of the oil tanker. The only reasonable interpretation of the cartoon was that the cartoonist was critical of Hartley's and Union's indifference and their decision to let the onus of the diversion fall squarely and singularly upon the residents of Los Angeles. Such expression was one of opinion and not a defamatory statement of fact.

POINT II.

The Court of Appeal Committed Error of Constitutional Magnitude by Placing the Burden of Proof of the "Actual Malice" Issue on Petitioners.

At page 8 of its Opinion the Court of Appeal correctly assumed that the *New York Times* requirements applied since Hartley is a public figure and matters of public interest are involved. The court further stated (Appendix A, p. 8) that petitioners made "a strong showing" as to the basis for their impressions of Hartley's and Union's refusal to allocate the shortfall caused by the diversion of the tanker. The court nevertheless reversed, saying that petitioners:

> ". . . made no effort to demonstrate that there was any basis for a charge that appellant was in some way responsible for causing the diversion order." (Appendix A, p. 8.)

This holding was erroneous since:

> (1) Even if the cartoon were susceptible to any defamatory meaning, petitioners' affidavits showed that they did not act with "actual malice" in the *New York Times* sense; and

(2) Neither Hartley nor Union offered any evidence that petitioners acted either with knowledge of falsity or a reckless disregard for truth.

The burden of proof is on the plaintiff in a *New York Times v. Sullivan* case to prove with convincing clarity not only that a false statement of fact was made, but also that it was made with "actual malice," *i.e.*, knowledge of falsity or reckless disregard for truth. (376 U.S. 254, 279-280, 11 L. Ed. 2d 686, 706.) The showing required to raise a triable issue of fact as to "actual malice" is set forth in *Cervantes v. Time, Inc.*, 464 F. 2d 986 (8th Cir. 1972). There plaintiff complained that defendant had not made available to him "confidential news sources" for the alleged defamation. The appellate court noted this claim as being "not frivolous" but affirmed a summary judgment for defendant, holding that the plaintiff ". . . failed to demonstrate with convincing clarity that either defendant acted with knowing or reckless disregard of the truth." (464 F. 2d at 992; emphasis added.)

The Court of Appeal herein failed to recognize and apply the twofold requirement of the *New York Times* rule. To restate, in order for a statement about a public figure to be actionable, the plaintiff must prove that such statement was: (1) defamatory *and* (2) made with knowledge of falsity or a reckless disregard for truth.

The Court of Appeal's holding that petitioners " . . . made no effort to demonstrate that there was any basis for a charge that [Hartley] was in some way responsible for causing the diversion order" (Appendix, p. 8) is erroneous since the court's analysis was incomplete. Assuming, *arguendo*, that the cartoon did falsely

charge Hartley and Union with responsibility for the diversion, only one element of liability under the *New York Times* rule was established, namely that a false statement of fact was made. The other element of liability under the *New York Times* rule which had to be shown was that petitioners acted with knowledge of falsity or a reckless disregard for truth.

Petitioners' affidavits filed in the trial court conclusively demonstrated that even if the cartoon were construed to contain a defamatory statement of fact, any such statement was not made either with knowledge of falsity or a reckless disregard for truth. Those affidavits, none of which were contradicted by Hartley or Union, showed that at the time of the publication, petitioners had knowledge of the following facts:

(1) The existence of the fuel and energy crisis in Los Angeles;

(2) The diversion of the tanker by the government;

(3) Hartley's and Union's decision to use the tanker bound for Los Angeles;

(4) Hartley's and Union's decision to let the entire "shortfall" fall on Los Angeles and not spread it among Union's various customers;

(5) Hartley's and Union's apparent disinclination to answer the host of questions raised by the above facts; and

(6) The great concern felt by public agencies and the Los Angeles citizenry by reason of the diversion and Hartley's and Union's apparent indifference to the crisis. [C.T. 67-129.]

Further, such affidavits make clear that petitioners did not charge, nor intend to charge, that Hartley

and Union were responsible for the government diversion order. [C.T. 73, 127.]

There was not one shred of evidence before the trial court to show that petitioners had any reason to believe that the above facts were untrue, or that they acted recklessly with respect thereto. All of the evidence was that petitioners believed these facts to be true and had good reason to believe them. [C.T. 67-129.]

On this record, the trial court had no alternative but to grant the motion for summary judgment, even if the cartoon were susceptible to a defamatory meaning. This is so since the constitutional standard is that petitioners had no liability unless it was shown that they acted with "actual malice," *i.e.*, knowledge of falsity or reckless disregard for truth.

POINT III.

This Court Should Grant Certiorari so as to Confirm That Summary Judgment Is the Proper Method for Disposition of a New York Times v. Sullivan Case.

The seemingly endless efforts to restrain the fundamental rights of free speech and a free press, whether by governmental regulation, private litigation, or otherwise, require a continual reiteration of these liberties in the lexicon of the rights of the American people. The history of judicial protection of speech and press is long and honorable, and it therefore is appropriate to recall Justice Cardozo's admonition that free speech is the "matrix, the indispensable condition, of nearly

every other form of freedom." (*Palko v. Connecticut*, 302 U.S. 319, 327, 82 L. Ed. 288, 293, 58 S. Ct. 149, 152 (1937).) As this Court recently said:

> "Those guarantees [of freedom of speech and press] are not for the benefit of the press so much as for the benefit of all of us." *Time, Inc. v. Hill*, 385 U.S. 374, 389, 17 L. Ed. 2d 456, 468, 87 S. Ct. 534, 543 (1967)

Following this Court's landmark decision of *New York Times v. Sullivan*, various federal and state courts have utilized the summary judgment procedure as the most effective means of implementing the constitutional protection afforded by *New York Times*. For example, *Guitar v. Westinghouse Electric Corp.*, 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975) holds:

> "Moreover, because of the importance of free speech, summary judgment *is* the 'rule,' and not the exception, in defamation cases."

Summary judgment is and should be the "rule" in such cases since:

> "The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as the fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes." (*Washington Post Co. v. Keogh*, 365 F. 2d 965, 968 (D.C. Cir. 1966).)

This principle is also found in *Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael*, 492 F. 2d 438 (9th Cir. 1974):

> "We agree with our brothers of the District of Columbia and Fifth Circuits that it is important

that judges focus attention on summary judgment . . . in libel actions. When civil cases may have a chilling effect on First Amendment rights, special care is appropriate. Thus, a judicial examination at these stages of the proceeding, closely scrutinizing the evidence to determine whether the case should be terminated in a defendant's favor, provides a buffer against possible First Amendment interferences. The Supreme Court has instructed trial courts to 'examine for [themselves] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.' To be the unprotected, actual malice must be shown with 'convincing clarity.' *New York Times, supra,* 376 U.S. at 285-286, 84 S. Ct. at 728-729." (492 F. 2d at 441.)

See also:

Wasserman v. Time, Inc., 424 F. 2d 920 (D.C. Cir. 1970) [concurring opinion]; *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F. 2d 858, 864-865 (5th Cir. 1970); *Cerrito v. Time, Inc.*, 302 F. Supp. 1071, 1075 (N.D. Cal. 1969), aff'd 449 F. 2d 306 (9th Cir. 1970); *MacNeil v. Columbia Broadcasting System, Inc.*, 66 F.R.D. 22 (D.C. Cir. 1975); *Fram v. Yellow Cab.*, 380 F. Supp. 1314 (W.D. Pa. 1974); *Meeropol v. Nizer,* 381 F. Supp. 29 (S.D.N.Y. 1975).

The vice of failing to follow the rule of summary judgment in a *New York Times* case is shown in this matter. Here the California Court of Appeal has declined to follow its legal duty to assess the alleged defamatory nature of a publication in line with decisions

of this Court. Rather it enunciates a standard of a "possible" defamatory implication to an ignorant or uninformed reader and would allow that standard to be applied by a lay jury. Additionally, the court made no judicial examination and close scrutiny of the evidence to determine whether Hartley had offered any evidence to show that petitioners acted with "actual malice." This approach totally disregards this Court's mandate of *New York Times v. Sullivan* and its progeny and ignores the established summary judgment procedure developed by those courts which have followed this Court's direction.

* * *

In sum, the decision of the California Court of Appeal strikes at the very purpose of the constitutional privilege of free speech and free press in two important ways. First, by a strained and tortuous interpretation of the cartoon, it decrees a totally unreasonable standard for determining whether political and social criticism is defamatory.

Secondly, the California Court of Appeal requires that petitioners, in a case involving "public figures", prove that they did not make a false statement about Hartley and Union with "actual malice." This is not the law, and can only serve to create an atmosphere of fear and timidity upon those who would give voice to public criticism. This Court has pointed out in *New York Times v. Sullivan* that First Amendment freedoms cannot survive in such an atmosphere. (376 U.S. 254 at 278, 11 L. Ed. 2d at 705.)

Conclusion.

The purpose of the *New York Times v. Sullivan* rule is to promote open, uninhibited and robust debate and criticism of public figures and matters of public interest. Historically, social and political cartooning has been an important means of effecting such criticism. The cartoon in this case is a prime example of this venerable art. Its purpose was comment and criticism directed to an extremely topical matter. That is the nature of this form of expression. To shackle a cartoonist, by prohibiting his use of symbolism and caricature to convey his comment and criticism, cuts squarely across his constitutional privilege of free expression and the public's right to consider his comment and criticism.

For the foregoing reasons, the decision of the Court of Appeal should be reversed and the judgment for petitioners reinstated.

Dated: July 15, 1976.

Respectfully submitted,

WILLIAM A. MASTERSON,
Attorney for Petitioners.

ROBERT C. LOBDELL,
WILLIAM A. NIESE,
SHEPPARD, MULLIN, RICHTER & HAMPTON,
Of Counsel.

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Fred L. Hartley, Plaintiff and Appellant, v. Paul Conrad, The Times Mirror Company, a corporation, Los Angeles Times, a division of The Times Mirror Company, Otis Chandler and Anthony Day, Defendants and Respondents. 2d Civ. No. 46012, (Superior Crt. No. C 83707).

Filed: February 3, 1976.

APPEAL from judgment of the Superior Court, Los Angeles County. Norman J. Dowds, Judge. Reversed.

Frank J. Kanne, Jr., for Plaintiff and Appellant.

Robert C. Lobdell, William A. Niese, Sheppard, Mullin, Richter & Hampton, and William A. Masterson, for Defendants and Respondents.

Fred Okrand, Jill Jakes, Daniel C. Lavery and Mark D. Rosenbaum, for American Civil Liberties Union of Southern California, as Amicus Curiae, on behalf of Defendants and Respondents.

THE COURT:*

Plaintiff, Fred L. Hartley (appellant), the President of Union Oil Company of California, appeals from an adverse summary judgment, entered against him in a libel action. Defendants below (respondents here) are The Times Mirror Company, and its officers or employees Otis Chandler, Anthony Day and Paul Conrad. We reverse.

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*Before Allport and Potter, J.J., and Cole, J. assigned by the Chairman of the Judicial Council.

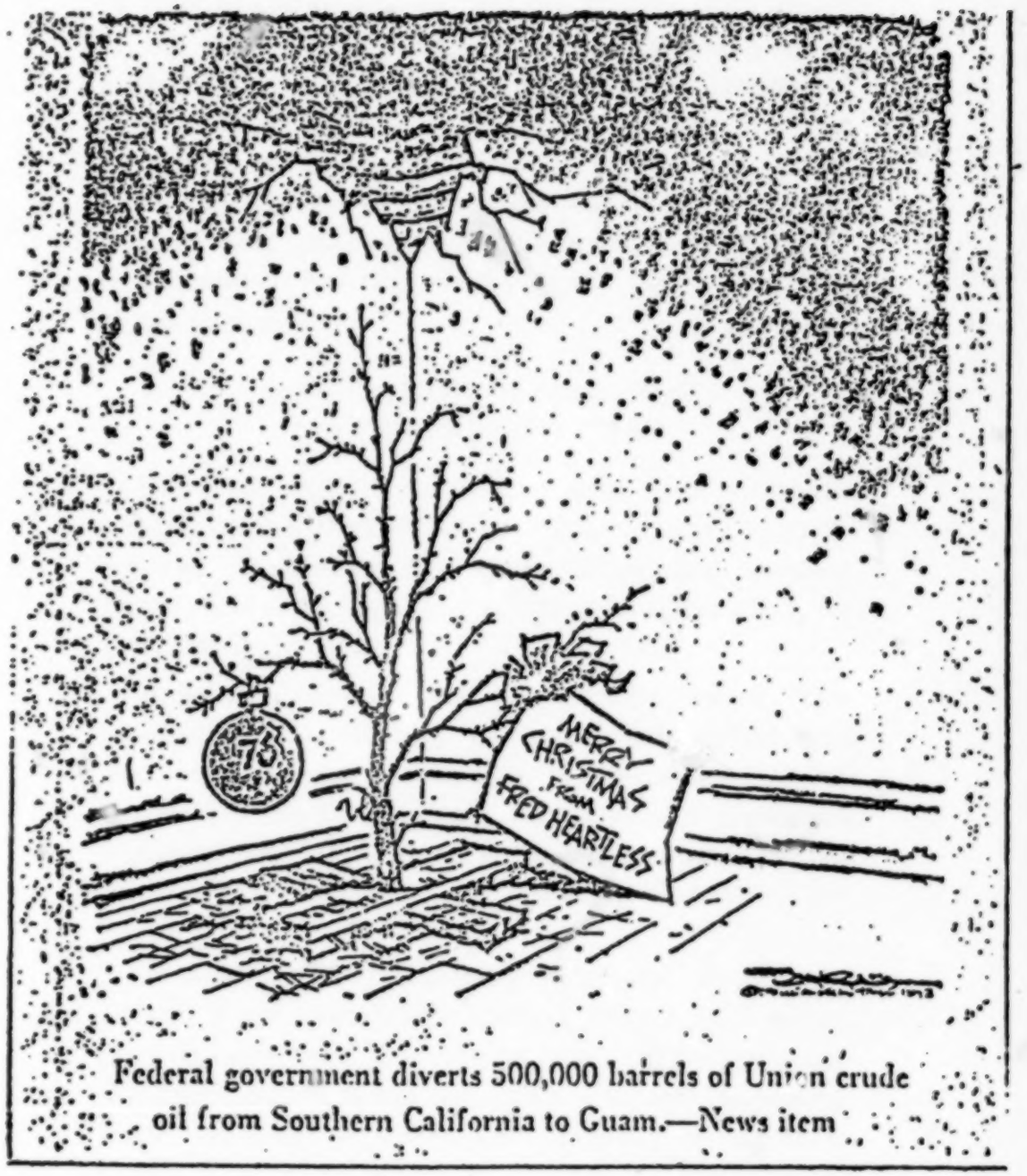
The claimed libel is based upon a cartoon appearing in the Los Angeles Times, the newspaper published by The Times Mirror Company. The cartoon and its caption are reproduced here:

APPLICABLE LAW

If a claimed libelous publication is susceptible of an innocent as well as a defamatory interpretation, a jury question is presented; if, however, there can be only one reasonable interpretation of the claimed libel, and that interpretation is nonlibelous "a court is required to rule as a matter of law that the material is not defamatory, and it is not allowed to submit the issue to a jury. This has always been the rule in California [citations omitted] and in recent years it has also become part of the guaranty of free speech under the First and Fourteenth Amendments to the federal Constitution. [citations omitted.]" (*Yorty v. Chandler* (1970) 13 Cal.App.3d 467, 475-476.)

If more than one meaning could be derived by the average reader, a question is presented for the jury's determination. (*MacLeod v. Tribune Publishing Co.*, (1959) 52 Cal.2d 536, 546-547.) In *MacLeod* our Supreme Court disapproved the "possible-innocent-meaning" rule which had appeared in several earlier cases.[1] This rule was to the effect that where challenged language had a possible innocent meaning it was not defamatory on its face. Rejecting that rule, the Supreme Court stated that its effect was to protect "not the

[1]*Peabody v. Barham* (1942) 52 Cal.App.2d 581; *Washer v. Bank of America* (1943) 21 Cal.2d 822; *Babcock v. McClatchy Newspapers* (1947) 82 Cal.App.2d 528; *Smith v. Los Angeles Bookbinders Union* (1955) 133 Cal.App.2d 486; *Menefee v. Codman* (1957) 155 Cal.App.2d 396; and *Jeffers v. Screen Extras Guild, Inc.*, (1958) 162 Cal.App.2d 717.



Federal government diverts 500,000 barrels of Union crude oil from Southern California to Guam.—News item

innocent defamer whose words are libelous only because of facts unknown to him, but the clever writer versed in the law of defamation who deliberately casts a grossly defamatory imputation in ambiguous language." (*MacLeod*, 52 Cal.2d at p. 551.) Further, said the Supreme Court, the provisions of section 45a of the Civil Code defining libel describe "not language susceptible of only one meaning, but language that carries *a* defamatory meaning on its face." (*Ibid.*; emphasis in the original.)

APPLICATION OF MACLEOD TO THE PRESENT CASE

We must hold the cartoon at issue here up to the yardstick prescribed for us by *MacLeod* and determine whether it contains *a* possible defamatory meaning when viewed by the eyes of the average reader. We conclude that it does.

Appellant contends that the cartoon meant "that plaintiff Fred L. Hartley was a heartless person, and that he had been responsible for diverting 500,000 barrels of Union crude oil from Southern California to Guam and that in doing so he had caused Christmas to be dismal, cheerless and bleak in Southern California."

In securing their summary judgment, respondents present declarations which showed, among other things, the following facts: The cartoon appeared on December 20, 1973, during the energy crisis. The federal government had ordered Union Oil Company to divert to Guam 500,000 barrels of oil destined for Los Angeles. The company indicated that this oil would have gone to the Department of Water and Power. The Los Angeles Times in various news articles criticized Union

Oil Company for failing to distribute the loss among all of its customers, instead of charging the full amount to the Department of Water and Power. It was in this context, respondents' declarations stated, that the cartoon was published.

We turn first to the assertion that the cartoon implies that appellant was heartless. It clearly does, but we hold that such implication is an expression of opinion only and cannot be a basis for liability on the part of defendants. (*Yorty v. Chandler, supra,* 13 Cal.App. 3d at pp. 472-473.) Anyone who did know that Union Oil Company had complied with the federal order by charging the entire "shortfall" to the Department of Water and Power, rather than allocating it among all or many of Union's customers, would naturally read the word "heartless" as a critical commentary that the decision was unfeeling and insensitive to the problems of Southern California created by the oil crisis. That is no more than expression of the cartoonist's opinion; it is the precise function he is supposed to perform.

Leaving aside archaic definitions, Webster's Third New International Dictionary (1966, p. 1045) defines "heartless" as "devoid of heart; lacking feeling or affection; unsympathetic, cruel." Roget's International Thesaurus (3d ed. 1972) classifies "heartless" under categories entitled "spiritless", "unfeeling", "despondent", "uncourageous", and "hard-hearted". None of these appellations, in the context of the cartoon in question can be described as making a false statement of *fact* about appellant; however, warranted or unwarranted the cartoonist was in making appellant, as an individual, the object of his criticism, he could express his view

that the challenged decision was "cruel", "unfeeling" or "hardhearted."[2]

It is true, as respondents urge, that anyone knowing the background facts set forth in respondents' declarations, could not reasonably read the cartoon as being susceptible of the implication that appellant Hartley had been responsible for diverting 500,000 barrels of oil from Southern California to Guam. The corollary charge that in making that diversion appellant had caused Christmas to be dismal, cheerless and bleak in Southern California would likewise fail.

The problem with the summary judgment, however, is that we have no warrant for assuming that the average reader will have known the background matters set forth in respondents' declarations nor for assuming that such a reader will give to the cartoon the foregoing innocent and non-libelous interpretation.

Even though the caption of the cartoon explicitly states that the federal government diverted the oil in

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[2]Appellant refers us to a statement in Prosser, Law of Torts, 4th ed., page 721, that to describe someone as "heartless" is defamatory on its face. The two cases cited by the author do not bear out his statement. The word "heartless" was not used in either of the libels involved. In *MacRae v. Afro-American Company,* 172 F.Supp. 184 (E.D. Pa. 1959), a 19-year-old girl had committed suicide, being despondent over mediocre grades. The libel was a statement that her mother had been extremely displeased over her daughter's scholastic standing and that the daughter had been told by someone, presumably the mother, not to come home unless her grades improved. The court said that in this interpretation, the article meant that the mother was at least partly responsible for the daughter's death. In *Brown v. Du Frey* (1956) 151 N.Y.S. 2d 649; 134 N.E. 2d 469, a wife who had been divorced from plaintiff husband more than 30 years, previously left a will stating that she made no provision for him because during her lifetime he had abandoned her, made no provision for her support, treated her with complete indifference and did not display any affection or regard for her. Neither case has any usefulness here.

question to Guam, the cartoon clearly refers to appellant[8] and to the company of which he is president. Readers not familiar with the story dealing with Union's allocation of the shortfall to the Department of Water and Power might reasonably, it appears to us, view the cartoon as meaning something other than that which respondents attribute to it. Respondent Conrad need not be presumed to have hit the mark in each of his daily cartoons; a reader unacquainted with the claimed background might simply be puzzled and wonder what the cartoon was all about. Such an implication, by itself, would be neutral at the worst. But, the cartoon leaves viewers who lacked the background knowledge set out in respondents' declarations free to speculate as to the nature and extent of the responsibility borne by appellant.

The general tone of the cartoon did not urge its viewers to be charitable in the inferences to be drawn. The "Fred Heartless" pun invited them to think the worst of appellant, in relation to some connection between him and the total situation presented by the cartoon. That total situation included not only the bleak Christmas in store for Southern California but as well the fact that it was the product of a federal government diversion order. Under such circumstances, it is not unreasonable to conclude that a substantial number of viewers of the cartoon might construe it to portray appellant as having some casual relationship to the government diversion order.

Given the status of the energy crisis in December, 1973, anyone whose conduct in any way deprived the average citizen of fuel could well be the object

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[8]Respondents do not deny that the "Fred Heartless" reference was meant to identify appellant.

of public hatred, obloquy or contempt within the statutory definition of libel. ("Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Civil Code, § 45.) This definition "is very broad and has been held to include almost any language which, upon its face, has a natural tendency to injure a person's reputation, either generally, or with respect to his occupation." (*Bates v. Campbell* (1931) 213 Cal. 438, 441; *MacLeod v. Tribune Publishing Co., supra*, 52 Cal.2d at p. 546.) It is not necessary that the plaintiff be charged with any illegal conduct in order for defamation to be shown. (*Stevens v. Snow* (1923) 191 Cal. 58, 62.) The determination whether a false imputation is defamatory must be made on the basis of the temper of the times and contemporary public opinion. (*Washburn v. Wright* (1968) 261 Cal. App.2d 789, 796.)

In *Newby v. Times-Mirror Co.* (1916) 173 Cal. 387, it was held libelous per se to falsely charge that a person was a hypocrite. In *Maidman v. Jewish Publications, Inc.* (1960) 54 Cal.2d 643, a charge that a prominent leader in Jewish affairs was "unworthy of his high position in B'nai B'rith, of knowing less about his religion than an adolescent child and of causing all Jewry to look ridiculous" (54 Cal.2d at p. 650) was held libelous per se, even though it did not "reach the extremity of vituperation." (*Id.*) A possible implication of the cartoon, as noted above, is that appellant was involved in exacerbating the fuel shortage. Such a charge is not a mere opinion, but rather a statement of fact.

In these circumstances, and given the strictures of *MacLeod v. Tribune Publishing Co., supra,* we cannot hold that as a matter of law appellant was not defamed.

APPLICATION OF NEW YORK TIMES CO. v. SULLIVAN RULE

Appellant contends that he is not "a public figure", and therefore not subject to the strict requirements of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254. That case establishes that constitutional guarantees of free speech protect utterances relating to public figures unless the utterances are made with malice. "Malice" means that the statements in question were made with knowledge of their falsity or with reckless disregard of their truth. (*Id.* at p. 280; *Greenbelt Pub. Assn. v. Bresler* (1970) 398 U.S. 6, 11.)

Respondents contend vigorously that there is no genuine issue of fact as to appellant's status as a public figure. They conclude that he was such, and that *New York Times* requirements apply. For present purposes, we assume that that is the case. Reversal is still compelled, however. While respondents made a strong showing of the basis for their charge that appellant's refusal to allocate the shortfall caused a bleak Southern California Christmas, negating reckless regard of the truth or knowledge of falsity in that respect, they made no effort to demonstrate that there was any basis for a charge that appellant was in some way responsible for causing the diversion order.

DISPOSITION

We hold, therefore, that summary judgment was improperly granted in this case. In so holding, we are not unmindful of the possible impact upon "the most fundamental meaning of a free press." (*Greenbelt Pub. Assn. v. Bresler, supra.*) We recognize that cartoons are meant to criticize; to express pictorially and by sharpened wit a commentary of the artist on the issues of the day. We also recognize that our task is to "ferret out the underlying themes of the cartoon and then determine whether these can reasonably be considered libelous." (*Yorty v. Chandler, supra,* 13 Cal.App.3d at p. 472.) We are, however, bound by *MacLeod v. Tribune Publishing Co., supra,* 52 Cal.2d 536, which clearly involved a public figure. *MacLeod* was decided five years prior to *New York Times Co. v. Sullivan, supra.* If the teaching of the latter case and those which have followed it have eroded the holding of *MacLeod*, it is for our Supreme Court and not for us to take corrective action. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The judgment is reversed.

APPENDIX B.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

April 22, 1976.

I have this day filed Order HEARING DENIED.

In re: 2 Civ. No. 46012, Hartley vs. Conrad.

Respectfully,

G. E. BISHEL
Clerk

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of August, A.D. 1976.

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-71

LOS ANGELES TIMES, a division of THE TIMES MIRROR COMPANY, PAUL CONRAD, THE TIMES MIRROR COMPANY, a corporation, OTIS CHANDLER, ANTHONY DAY,

Petitioners,

vs.

FRED L. HARTLEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California.

BRIEF IN OPPOSITION.

FRANK J. KANNE, JR.,
615 South Flower Street, Room 903,
Los Angeles, Calif. 90017,
(213) 624-1841,
Attorney for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

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LOS ANGELES TIMES, a division of THE TIMES MIRROR COMPANY, PAUL CONRAD, THE TIMES MIRROR COMPANY, a corporation, OTIS CHANDLER, ANTHONY DAY,

Petitioners,

vs.

FRED L. HARTLEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California.

BRIEF IN OPPOSITION.

Jurisdiction.

Appellants invoke jurisdiction of the Supreme Court of the United States under 28 U.S.C. §1257(3) and Supreme Court Rule 19.

(a) Lack of Finality.

Respondent objects to the jurisdiction of the court on the grounds that the decision sought to be reviewed is not a "final judgment or decree".

> "1257. Final judgments or decrees rendered by the highest court of a State in which a decision

could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under, the United States."

The petitioners make the bald statement that jurisdiction is invoked under 28 U.S.C. §1257(3), but they make no showing or argument in support thereof. The failure of the petitioners to present with accuracy, brevity and clearness whatever is essential to show jurisdiction is a sufficient reason to deny the petition.

Supreme Court Rule 23(4).

Fred L. Hartley commenced this action for libel in the Superior Court of California, County of Los Angeles on March 27, 1974 against Paul Conrad, Los Angeles Times, Otis Chandler and Anthony Day. Prior to the taking of any depositions, submission of interrogatories or other discovery proceedings, the defendants made a motion for summary judgment contending that:

"(1) The alleged defamatory publication concerns public figures and matter of public interest and is privileged under the First and Fourteenth Amendments to the United States Constitution. The alleged defamatory publication was made in good faith and in the reasonable belief that it

was true and without knowledge of its alleged falsity and without reckless disregard of its truth or falsity. Such constitutional privilege provides a complete defense to the action; and therefore the action has no merit and there are no triable issues of fact.

"(2) The alleged defamatory publication is not defamatory, no cause of action has been stated against any defendant and therefore the action has no merit and there are no triable issues of fact." [R. 30, lines 1-12].

The motion was granted on September 27, 1974 and judgment for the defendants was entered on October 11, 1974. On February 3, 1976, in an unpublished interlocutory opinion, the California Court of Appeal held that summary judgment was improperly granted and reversed the judgment. The Supreme Court of California denied a hearing on April 22, 1976 (Petition, Appendix B). Thus, the case is now back in the Superior Court of the County of Los Angeles pending trial. There is no final judgment or any judgment by the highest court of the State or at all.

Petitioners are unable to establish jurisdiction in the Supreme Court pursuant to 28 U.S.C. §1257(3). They are likewise unable to establish jurisdiction under the Supreme Court rulings giving the requirement of finality a practical rather than a technical construction. *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Mr. Justice White's opinion in *Cox Broadcasting Corp. v. Cohn, supra* at pages 476-487 analyzes the requirement of finality as to a federal issue.

One of the most important circumstances in determining finality is whether the additional State court proceedings would decide other federal questions that might also require review by the Supreme Court at a later date (*Ibid.*, p. 477). We must therefore look at the circumstances surrounding the federal issue in the instant case. Unfortunately the petition is of little help and is actually misleading. In their opening sentence petitioners say:

> "This is a libel action involving public figures and matters of public interest." (Petition, p. 1).

The respondent has at all times asserted that he is a *private* individual [R. pp. 131-135 and 159-162] and that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) sets forth the extent of First Amendment protection.

> "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." (*Ibid.*, at p. 347).

The California Court of Appeal decision found it unnecessary to rule on the private individual vs. public figure issue, since it held there was an issue of fact on the alternative basis for liability, *i.e.*, whether the defamatory cartoon was published with malice in the federal sense (Petition, Appendix A, p. 8). The Court of Appeal having reversed the judgment of the Superior Court, the issue of private individual vs. public figure is open and undecided. In the intervening period this Court has decided *Time, Inc. v. Firestone*, ... U.S. ....., 47 L.Ed.2d 154 (1976) and further defined the

meaning of "public figure" for the purposes of the First and Fourteenth Amendments.

The "public figure" vs. "private individual" issue being unresolved in the State Court, there is certainly a possibility that the further proceedings might require review by the Supreme Court. Hence, there is no final judgment and piece-meal review is contrary to 28 U.S.C. §1257(3).

In those cases where the Supreme Court has relaxed the finality requirement, the State judgment has been plainly final on the federal issue. In *Cox, supra,* the Georgia Supreme Court's judgment rejected challenges under the First and Fourteenth Amendments to the state law authorizing damage suits against the press for publishing the name of a rape victim whose identity was revealed in the course of a public prosecution. The instant State judgment decides only that the cartoon in question is susceptible of a defamatory interpretation and that there is an issue of fact as to whether it was published with malice.

Jurisdiction should be rejected for lack of finality, as otherwise the Court will be examining the merits of the case before determining jurisdiction, as pointed out by Mr. Justice Rehnquist in his dissent in *Cox Broadcasting Corp. v. Cohn, supra,* pages 507-510.

The present action alleges that petitioners published a cartoon that libelled a private individual, and that it was published with knowledge of its falsity or with reckless disregard of whether it was true or false. The unreported decision of the California Court of Appeal merely gives the respondent the right to have a jury determine the issues. The interpretation of a cartoon and its subtle and not so subtle meanings is

more complex than the interpretation of an article. A sharper copy of the cartoon is included on the opposite page.

In *Goldwater v. Ginzburg* (S.D.N.Y. 1966) 261 F.Supp. 784 at 788 the District Court said, "The issue of actual malice on the part of defendants seems particularly inappropriate for disposition by summary judgment because it concerns 'motive, intent, and subjective feelings, and reactions.' *Empire Electronics Co. v. United States,* 311 F.2d 175, 180 (2nd Cir. 1962); see also Moore's Federal Practice (2d ed.) 2581. The Supreme Court has cautioned against summary judgment 'where motive and intent play leading roles.' *Poller v. Columbia Broadcasting,* 368 U.S. 464, 474 (1962)."

In *Time, Inc. v. Ragano* (5th Cir. 1970) 427 F.2d 219 the Court of Appeal affirmed an order denying a motion for summary judgment in a case in which Time had published a picture of seven men including the plaintiff, an attorney, and referred to the group as "top Cosa Nostra hoodlums." The Court said at page 221:

> "In view of the principle that all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion for summary judgment, e.g. *United States v. Diebold, Inc.* (1962) 369 U.S. 654 . . . we think that a genuine issue of material fact exists. . . ."

(b) Sound Judicial Discretion Calls for a Denial of Jurisdiction.

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor." *Supreme Court Rule* 19(1).

Federal government diverts 500,000 barrels of Union crude oil from Southern California to Guam.—News item

Sound judicial discretion calls for a denial of jurisdiction because the decision of the State Court is not contrary to the decisions of the Supreme Court. Harmonious state-federal relations are enhanced when this Court rejects review of a State court's decision on matters of peculiarly local concern.

The petitioners are asking the Supreme Court of the United States to rule, as a matter of law, that they are entitled to summary judgment. In order to justly consider such a request, this Court would have to review all of the evidence before the trial court, the serious objections raised under the California law as to the admissibility of large quantities of the evidence [R. 162, line 16 to 165, line 6 and see discussion below under Questions Presented], the California law of defamation, and possible interpretations of the subject cartoon by reasonable viewers.

The petition fails to demonstrate any reasons why this Court should undertake such a task that more fittingly belongs in a trial court.

The unpublished interlocutory opinion of the Court of Appeal applies existing decisions to the particular facts of this case.[1] It does not purport to decide any question that would seriously erode freedom of the press under the First Amendment.[2]

---

[1]Rule 977 of California Rules of Court provides that an unpublished opinion shall not be cited by a court or by a party in any other action or proceeding except when the opinion is relevant under the doctrines of the law of the case, res judicata or collateral estoppel.

[2]*Cf. Stone, Warden v. Powell,* .... U.S. .... (July 6, 1976, 74-1055) where it was held that Federal exclusionary rules on search and seizure claims cannot be raised in federal court review of state convictions. In footnote 31 at page 24 of Slip Opinion the Court said:

(This footnote is continued on next page)

The petition for writ of certiorari should be denied for lack of jurisdiction.

Questions Presented.

Respondent disputes petitioners' recitation under Questions Presented. At page 2 of their petition, petitioners say:

> "On December 20, 1973 petitioner Los Angeles Times ('The Times') published an editorial cartoon expressing an opinion sharply critical of the apparent indifference of Union and respondent Fred L. Hartley, Union's president ('Hartley') to the plight of Los Angeles, created by the diversion of the tanker and their unexplained failure to take any steps to mitigate the loss suffered by Los Angeles as a result of the diversion."

This recitation is inaccurate in stating (1) that the cartoon was an expression of opinion, and (2) in attributing to the respondent an apparent indifference to the plight of Los Angeles.

The meaning and intent of a cartoon is less precise than that of an article and this makes more difficult the delineation of what is fact and what is opinion.[3]

"Resort to habeas corpus especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government. They include '(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded.' *Scheckloth v. Bustamonte* 412 U.S. at 259 (Powell, J. concurring)."

[3]"Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust and wide-open debate on public issues." *Gertz v. Robert Welch, Inc., supra,* at 339-40.

In opposition to the motion for summary judgment, respondent filed a declaration by Donald Goodenow, managing editor of the Los Angeles Herald-Examiner, containing a copy of his editorial published on the day after the cartoon was published. It read:

"UNFAIR ATTACK"

> "There is no excuse for such irresponsible journalism as exemplified by a vicious editorial cartoon which appeared in the Los Angeles Times yesterday.
>
> "For some cloudy minds, it obviously is open season to attack industry, particularly the oil industry, regardless of truth. The cartoon in question implied that an oil company's president was responsible for diverting 500,000 barrels of oil from Southern California to Guam.
>
> "The truth: the U.S. government ordered the oil sent there, not the oil company. It was diverted for Military use.
>
> "There are many problems in the so-called fuel crisis, but we never will solve them with distorted accusations and twisted reasoning and vitriolic attacks against our business leaders.
>
> "This is the time for clear heads and cool action. Let's encourage leadership, not bury it in the muck of enervating vendettas." [R. pp. 151-153].

The California Court of Appeal stated the rule that if more than one meaning could be derived by the

average reader, a question is presented for the jury's determination. It further found that it was reasonable to conclude that a substantial number of viewers of the cartoon might construe it to portray respondent as having some causal[4] relationship to the governmental diversion order (as the editor of the Herald-Examiner did). It then said,

> "Such a charge is not a mere opinion, but rather a statement of fact." (Petition, Appendix A, p. 7).

Petitioner's attempt to categorize the cartoon as an opinion attributing to the respondent an apparent indifference in the plight of Los Angeles is unsound. The Court of Appeal pointed out that there was no basis for assuming that the average reader would have known the background matters nor for assuming that such a reader would give to the cartoon such a non-libelous interpretation (Petition, Appendix A, p. 5).

The determination of whether a publication is one of fact or opinion is a question of law to be decided by the Court after looking at the nature and context of the communication as a whole.

> *Gregory v. McDonnell Douglas Corp.*, 17 Cal.3d 596 (July 23, 1976).

The California Court of Appeal having ruled that the cartoon contained a statement of fact, it is misleading for petitioners to refer to it as an expression of opinion.

In addition to disputing the prefatory statement under the heading of Questions Presented, respondent contends

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[4]There is a significant typographical error at page 6 of Appendix A to petition where the word "casual" is printed rather than "causal" as used by the Court of Appeal.

that petitioners' specific statement of questions is inadequate.

If the Court accepts jurisdiction, the issues are:

1. Was there an issue of material fact as to whether the respondent, Fred L. Hartley, was a private or public figure?
2. Was there an issue of material fact as to whether the cartoon was published with knowledge of its falsity or with reckless disregard of whether it was true or false?
3. Was the subject cartoon susceptible of a defamatory interpretation by the average reader?

Constitutional Provisions Involved.

In addition to the First and Fourteenth Amendments, United States Constitution, the Seventh Amendment is involved:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be re-examined in any court of the United States, other than according to the rules of the common law." (U.S. Const., Amendment VII).

Statement of the Case.

Respondent objects to petitioners' Statement of the Case (Petition, 4-9) in its entirety and asks that it be stricken. As previously noted, this is an action by respondent Fred Hartley against cartoonist Paul Conrad, *et al.*, for an allegedly defamatory cartoon drawn by Conrad and published in the Los Angeles Times on December 20, 1973. The petitioners made a motion for summary judgment pursuant to *California*

Code of Civil Procedure, Section 437c, on the grounds of constitutional privilege and claimed that Hartley was a public figure and that the cartoon was published without malice and was not defamatory. The trial court granted the motion for summary judgment and the Court of Appeal reversed.

There has been no discovery, no trial and there are no findings of fact. The reversal of the summary judgment makes the trial court ruling a total nullity. It is indeed presumptuous, if not downright misleading, to attempt a recitation of facts as petitioners do.

California law imposes stringent requirements before granting the drastic relief of summary judgment, which denies a litigant the right to a trial. *California Code of Civil Procedure,* Section 437c provides in part:

> "Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."[5]

The documentation relied upon by the trial court must consist of competent evidence, irrespective of whether objection is made thereto.

> *Dugar v. Happy Tiger Records, Inc.,* 41 Cal. App.3d 811, 815, 817 (1974).

Objections were made in the instant case [R. 162, line 16 to 165, line 6].

The declaration of petitioner Anthony Day consisted of 59 pages, including 21 exhibits of copies of articles published in the Los Angeles Times and written by at least twelve different staff writers [R. 67 to 126].

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[5]The full text of Section 437c is set forth in Appendix A to this brief.

It is apparent that although the declaration of petitioner Day recites:

> "I have personal knowledge of the facts stated herein and if sworn as a witness could competently testify thereto." [R. 67, lines 12-13],

his declaration contradicts this. The declaration conclusively shows that it is hearsay by incorporating the articles of the twelve different staff writers of the Los Angeles Times, which articles are themselves based on hearsay.[6] The Day declaration does not satisfy the requirement of *Code of Civil Procedure Section 437c* that the declaration "shall show affirmatively that the affiant is competent to testify to the matters stated therein."

> *Keniston v. American Nat. Ins. Co.,* 31 Cal. App.3d 803, 813 (1973).

Petitioners are attempting to usurp the function of the jury and elevate their contentions to the status of facts. They are not entitled to do this.

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[6]The efforts of Day to incorporate reporter Lee Dye's slanted version of the "Oil Caper" story of December 19, 1973 [Day declaration, R. 72, lines 15-29 and Ex. 16, p. 108] which in turn cedits unidentified "various sources and spokesmen," show that the contents of the articles were not within the personal knowledge of Day, the declarant, or even that of Lee Dye, the reporter.

REASONS FOR DENYING THE WRIT.

POINT I.

There Was an Issue of Material Fact as to Whether the Respondent, Fred L. Hartley, Was a Private or Public Figure.

Petitioners contended that Fred Hartley was a public figure and that the publication of the defamatory cartoon was protected by the constitutional privilege. Respondent contended that he was not a public figure, but a private individual entitled to be protected from libelous publications. The California Court of Appeal held that there was an issue of fact as to whether the cartoon had been published with reckless disregard of whether it was true or false. Since this alternative basis of liability necessitated a reversal of the summary judgment, the Court of Appeal found it unnecessary to rule on whether there was an issue of fact with regard to respondent's status as a private figure.

The Supreme Court should deny the petition for writ of certiorari, since to grant it would involve this Court in having to make evidentiary rulings on declarations and other evidence offered in the trial court below.

The entire effort of the petitioners to show that Hartley was a public figure was based on articles in their own newspaper from "various sources and spokesmen," the competency of which was challenged. (See discussion above under "Statement of the Case.")

The determination of whether Hartley is a private or public figure should be determined in a trial court where the evidence can be fully developed, its competency tested, and the recent elucidation by the Supreme

Court in *Time, Inc. v. Firestone, supra,* at page 5 of Slip Opinion applied.

To do less than this would jeopardize the respondent's constitutional right to a jury trial. (United States Constitution, Amendments VII and XIV.)

Jacob v. New York, 315 U.S. 752, 62 S.Ct. 854 (1941).

Principles applicable to summary judgment motions generally, are applicable to such motions when made in a defamation action. *Goldwater v. Ginzburg, supra; Time, Inc. v. Ragano, supra; Rinaldi v. Village Voice, Inc.,* 45 A.D. 2d 180, 365 N.Y.S.2d 199, *cert. den.,* 423 U.S. 883, 96 S.Ct. 153, 46 L.Ed. 112 (1975); *Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co.,* 43 Ohio App. 2d 105, 334 N.E.2d 494, *cert. den.,* 423 U.S. 883, 96 S.Ct. 151, 46 L.Ed.2d 111 (1975). *Goldwater* further held that upon such a motion in a defamation case, as in all other actions, the Court must resolve all ambiguities and draw all reasonable inferences in favor of the party opposing the motion.

POINT II.

There Was an Issue of Fact as to Whether the Cartoon Was Published With Knowledge That It Was False or With Reckless Disregard of Whether It Was True or False.

The defendants' attempt to show good faith in publishing the cartoon does no more than raise a possible issue for determination by the jury. They admit that they at all times knew the government diverted the oil tanker. This alone raises a triable issue of knowledge of falsity dependent upon the interpretation of the cartoon by the average reader.

There was evidence to raise an issue of fact as to whether the defamatory cartoon was published with knowledge of its falsity or reckless disregard of its truth or falsity.

It is apparent that the editor of the Los Angeles Herald-Examiner interpreted the cartoon as implying that Hartley was responsible for the oil diversion. (See quotation of editorial, *supra,* under Questions Presented.)

As a result of the publication of the subject cartoon the Board of Directors of the Los Angeles Chamber of Commerce unanimously adopted the following resolution:

> "'The Board of Directors of the Los Angeles Area Chamber of Commerce deplores the personal attack on a prominent business leader and a major employer in the Los Angeles area, carried in the Conrad cartoon.
>
> "Solutions to the great issues of our time will come from the concerns, imagination and initiative of the business leadership working in concert with the government. Personal attacks such as carried in this cartoon of the Times are a part of the problem and contribute nothing to solutions." [R. pp. 148-149].

Mr. Justice Compton of the California Court of Appeal, has expressed the opinion that Conrad's cartoons amount to highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

Justice Compton in his concurring opinion in *Yorty v. Chandler* (1970) 13 Cal.App.3d 467 at p. 479, referring to the defendant Paul Conrad said:

> "The protection of the freedom of a responsible press does not require that we insulate from liability for libel the artists whose pens drip venom and whose skill in drawing and cartooning far exceeds their sense of responsibility, respect for the truth and the depth of their understanding of public issues."

Defendants cannot excuse their conduct by saying they did not intend to charge Hartley with being responsible for the oil diversion. In *Montadon v. Triangle Publications* (1975) 45 Cal.App.3d 938 (Cert. denied, U.S. Supreme Court, October 6, 1975) the Court affirmed a libel judgment based on an article that resulted in a false impression of Miss Montadon's status and said at page 949:

> "While this result was apparently not intentional, it was one which those responsible should have foreseen and one which showed a reckless disregard for the truth or falsity of the statement."

Miss Montadon was a public figure and the Court held there was ample proof of malice to satisfy the constitutional requirement.

The grave danger of a court depriving a litigant of his constitutional right to a jury trial in a libel action was noted and corrected by the Ninth Circuit Court of Appeal in *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777 (1975) (Cert. denied, U.S. Supreme Court, Nov. 3, 1975). The trial judge in *Alioto* had taken the question of actual malice from the jury and granted a judgment n.o.v. for defendant. The Court of Appeal reversed.

POINT III.

The Cartoon Was Susceptible of a Defamatory Interpretation by the Average Reader.

In their Point I petitioners argue that no reasonably informed reader could have believed other than that the federal government was responsible for the diversion of the oil tanker. This is an absurd contention in view of the unanimous ruling of the Court of Appeal that the cartoon was susceptible of a defamatory interpretation (and the denial of a hearing by the California Supreme Court). The clever writer versed in the law of defamation who deliberately casts a grossly defamatory imputation in ambiguous language may be held liable.

> *MacLeod v. Tribune Publishing Co.*, 52 Cal.2d 536, 551 (1959)

It would certainly seem that if that many appellate judges could construe the cartoon as being defamatory, it is impossible for the petitioners to establish that there is no issue of fact for a jury to determine.

Respondent filed a declaration by Donald Goodenow, managing editor of the Los Angeles Herald-Examiner in opposition to the motion for summary judgment. A copy of Mr. Goodenow's editorial published the day after the cartoon was published is quoted above at page ..... The editorial said in part:

> "The cartoon in question implied that an oil company's president was responsible for diverting 500,000 barrels of oil from Southern California to Guam."

At a minimum, this evidence effectively refutes petitioners' contention that no reasonably informed reader

could have believed other than that the federal government was responsible for the oil diversion.

Under the temper of the times and contemporary public opinion, a substantial number of viewers of the cartoon might construe it to portray appellant as having some causal relationship to the governmental diversion order.

The rule of law is that it is for the trier of fact to determine whether a publication is defamatory, unless there can be only one reasonable interpretation of the cartoon, and that interpretation is non-libelous.

> *Yorty v. Chandler*, 13 Cal.App.3d 467, 475 (1970);
>
> *MacLeod v. Tribune Publishing Co.*, 52 Cal.2d 536, 546 (1959);
>
> *Mellon v. Times Mirror*, 167 Cal. 587, 592 (1914).

The publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader.

> *MacLeod v. Tribune Publishing Co. supra*, at 547.

The test is whether in the mind of the average reader the publication, considered as a whole, could reasonably be considered as defamatory.

> *Patton v. Royal Industries, Inc.*, 263 Cal.App.2d 760, 765;
>
> *Mullins v. Brando*, 13 Cal.App.3d 409, 415 (1970).

The purpose of allowing the plaintiff to have a jury trial is to determine the effect of the cartoon

on the average reader. One can hypothesize interminably on this, but it is sufficient at this point that the cartoon be susceptible of a defamatory meaning. The defendants come squarely within the definition of the "clever writer versed in the law of defamation who deliberately casts a grossly defamatory imputation in ambiguous language."

Conclusion.

The petition for writ of certiorari should be denied because there has been no final judgment by the highest court of the State of California. The petitioners are asking the United States Supreme Court to rule as a matter of law that respondent Hartley is a public figure and that the cartoon was not published with a reckless disregard of the truth. They ask the Supreme Court to do this even though the evidence has not been developed and tested for admissibility.

In the cases since *New York Times v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964) the Supreme Court has sought to balance the Constitutional protection of the press with the protection of one's name. It is unrealistic to suggest that the present action has resulted in the slightest timidity or chilling of the petitioners. The respondent should be allowed to proceed with the trial of the case on its merits.

Respectfully submitted,

FRANK J. KANNE, JR.,
Attorney for Respondent
Fred L. Hartley.

APPENDIX A.

California Code of Civil Procedure, § 437c.

§ 437c. [Summary proceedings on claim that action or defense is unmeritorious: Motion: Support of motion: Procedure on motion: Judgment: Appeal] Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense thereto. The motion may be made at any time after 60 days has elapsed from the general appearance in the action or proceeding of, each party against whom the motion is directed. Notice of the motion and supporting papers shall be served on the other party to the action at least 10 days before the time fixed for the hearing. The filing of such motion shall not extend the time within which a party must otherwise file a responsive pleading.

The motion shall be supported or opposed by affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice shall or may be taken.

Such motion shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the admissible evidence set forth in the papers and all inferences reasonably deducible from such evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from such evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

If a party is otherwise entitled to a summary judgment pursuant to the provisions of this section, summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to such fact; or where a material fact is an individual's state of mind, or lack thereof, and such fact is sought to be established solely by the individual's affirmation thereof.

If it appears that the proof supports the granting of such motion as to some but not all the issues involved in the action, or that one or more of the issues raised by a claim is admitted, or that one or more of the issues raised by a defense is conceded, the court shall, by order, specify that such issues are without substantial controversy. At the trial of the action the issue so specified shall be deemed established and the action shall proceed as to the issues remaining.

If it appears from the affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as may be just.

If the court determines at any time that any of the affidavits are presented in bad faith or solely for purposes of delay, the court shall order the party presenting such affidavits to pay the other party the amount of the reasonable expenses which the filing of the affidavits caused such other party to incur.

Except where a separate judgment may properly be awarded in the action, no final judgment shall be entered on a motion for summary judgment prior to the termination of such action, but the final judgment in such action shall, but the final judgment in such action shall, in addition to any matters determined in such action, award judgment as established by the summary proceeding herein provided for.

A summary judgment entered under this section is an appealable judgment as in other cases.

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-71

LOS ANGELES TIMES, a division of THE TIMES MIRROR COMPANY, PAUL CONRAD, THE TIMES MIRROR COMPANY, a corporation, OTIS CHANDLER, ANTHONY DAY,

Petitioners,

vs.

FRED L. HARTLEY,

Respondent.

REPLY BRIEF.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Respondent.

REPLY BRIEF.

JURISDICTION.

Petitioners submit this Reply Brief pursuant to Supreme Court Rule 24. The purpose of this Reply Brief is to concisely address two issues raised in respondent Hartley's Brief in Opposition to the Petition for a Writ of Certiorari.

POINT I.

This Court Has Jurisdiction Pursuant to 28 U.S.C. §1257(3) and Supreme Court Rule 19.

Respondent in his Brief in Opposition (herein "Brief") contends that the Court has no jurisdiction on the ground that the decisions of the California

Supreme Court and California Court of Appeal below are not final judgments or decrees within the meaning of 28 U.S.C. §1257(c).

Respondent's claim is wrong. The summary judgment entered on behalf of petitioners upon order of the trial court is a final judgment which is appealable under California law. California Code of Civil Procedure §437(c); *King v. State,* 11 Cal.App.3d 307 (1970); *Oliver v. Swiss Club Tell,* 222 Cal.App.2d 528 (1963). Further, the judgment of the Court of Appeal reversing the trial court's judgment of summary judgment for petitioners became a final judgment on appeal within thirty days after filing. Rule 24(a), *California Rules of Court; Chin Ott Wong v. Title Ins. & Trust Co.,* 91 Cal.App.2d 1 (1949). Similarly, the decision of the Supreme Court, whether it be an order denying a petition for hearing or otherwise, is a final judgment thirty days after filing of that decision. Rule 24(a), *California Rules of Court.*

This Court has followed a pragmatic approach in determining whether a decision of the highest state court on a federal issue is a final judgment or decree. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 955 S.Ct. 1029, 43 L.Ed.2d 328 (1975). This approach is necessary to protect the interests of parties who might otherwise be adversely affected by the Court not reviewing the federal issues raised in the state court actions. For this reason, this Court has long held that it is proper for the Court to invoke jurisdiction under 28 U.S.C. §1257(3) to review the judgment of an intermediate state court of appeal where the supreme court of that state in its discretion declined to review the judgment. *Chicago & E.I.R. Co. v. Ind. Comm. of Ill.,* 284 U.S. 296, 52 S.Ct. 151, 76 L.Ed. 304 (1931). Thus, the mere fact that the California Supreme Court declined to grant a hearing on the Court of Appeal's reversal of the summary judgment in favor of petitioners does not preclude this Court from reviewing the important constitutional questions raised by the Petition for Certiorari.

This determination of the issues raised in this case is mandated by the decisions of this Court and others. Following the guidelines enumerated in *New York Times v. Sullivan,* the majority of the cases support the position that because of the importance of free speech, summary judgment should be the rule and not the exception. *Washington Post Co. v. Keogh,* 365 F.2d 965, 968 (D.C. Cir. 1966); *Guitar v. Westinghouse Electric Corp.,* 396 F.Supp. 1042 (S.D.N.Y. 1975); and cases cited at pages 25-26 of petitioners' Petition for Writ of Certiorari. This Court has jurisdiction to review state court decisions denying summary judgment to defendants in defamation actions. Otherwise, there will exist the chilling effect on First Amendment rights proscribed by *New York Times v. Sullivan,* 376 U.S. at 285-286, 84 S.Ct. at 728-729.

POINT II.

Petitioners Contend That the Cartoon Involves Only Opinion on Public Figures on Matters of Serious Public Interest and Is Therefore Constitutionally Protected.

Respondent contends that the California Court of Appeal ruled the cartoon contained a statement of fact and that it is misleading for petitioners in their Petition to refer to it as an expression of opinion (Brief, p. 10).

This claim reflects respondent's total misconception of petitioners' position. It is precisely because the California Court of Appeal erroneously held that the cartoon contained a false statement of fact and improperly applied the requirements of *New York Times* (a judgment acquiesced with by the California Supreme Court), that petitioners seek relief from this Court. Petitioners do not mislead by claiming that the cartoon contains only opinion. That is exactly their position. This position is supported by the relevant decisions and a common sense view of the cartoon itself.

The Petition sets forth in detail the reasons and authorities why the cartoon involves only opinion. In addition, petitioners invite the Court's attention to the decision of the Second Circuit Court of Appeals in *Buckley v. Littell,* Docket No. 75-7358 (June 30, 1976). *Buckley* is strong support for the positions articulated in the Petition and is an excellent example of the proper application of this Court's guidelines to actions involving allegedly defamatory statements.

Plaintiff Buckley had brought an action for defamation against Littell for allegedly libelous statements contained in a book written by Littell. The district judge held that the book charged Buckley with being

a "fellow traveler" of the fascists. The Circuit refused to accept this determination. Instead, the court stated as follows:

> "The judge's view of the book was that [i]t is clear that Buckley is charged with being a fellow traveler of the fascists. 394 F.Supp. at 925. But the book does *not* say this; this is an interpretation of the passage which is possible, but it is only one interpretation.
>
> * * *
>
> "It can be seen, the moment we are involved in ascertaining what meaning Littell's statement purports to convey, that we are in the area of opinion as opposed to factual assertion." (*Buckley* at pp. 4612, 4617.)

Buckley is directly in line until this Court's decision in *Greenbelt Coop. Pub. Assn. v. Bresler,* 398 U.S. 6, 26 L.Ed.2d 6, 90 S.Ct. 1537 (1970). To sum up, these cases hold that expressions of opinion are not actionable and the constitutional standard for determining whether a publication is defamatory is not whether it contains a possible defamatory meaning to some person.

Conclusion.

For the above reasons and those stated in the Petition, this Court should grant certiorari.

Respectfully submitted,

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MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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OCTOBER TERM, 1976

No. 76-71

LOS ANGELES TIMES, a division of THE TIMES MIRROR COMPANY, PAUL CONRAD, THE TIMES MIRROR COMPANY, a corporation, OTIS CHANDLER, ANTHONY DAY, *Petitioners*

v.

FRED L. HARTLEY, *Respondent*

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter "ANPA") respectfully moves this Court for leave to file the accompanying Brief Amicus Curiae in support of the Petition for Writ of Certiorari filed herein. The Petitioners have consented to ANPA's filing of a brief amicus curiae; the Respondent has declined to do so.

The opinion of the California Court of Appeal for the Second Appellate District, with review thereof denied by the Supreme Court of California, places itself squarely athwart the proper administration of justice

in the field of libel law by reducing the exercise of appropriate summary judgment proceedings to a useless charade. Your amicus fully recognizes the importance of a litigant's day in court in order to prove his or her case. Just as importantly, the litigant defending a case is entitled to use the appropriate court procedures as set forth in the federal rules and in the state court rules of procedure to dispose of meritless litigation in summary fashion rather than be harrassed into large money settlements in order to avoid the cost of expensive trials, or even worse, in the field of the First Amendment, be forced into a status of timidity in approaching its service to the people of this county of providing uninhibited reporting. Obviously, American Newspaper Publishers Association has a deep and abiding interest in seeing that the people of the United States are afforded full and complete reporting and editorial comment as depicted in the cartoon in question here, without fear that someone aggrieved by same can bring a lawsuit which must be tried rather than summarily dismissed when clear-cut constitutional principles cry for its dismissal.

The American Newspaper Publishers Association is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,140 newspapers representing over ninety percent of the total daily and Sunday newspaper circulation in the United States. A recent bylaw change has allowed an increasing number of non-daily newspapers to join ANPA. The Los Angeles Times, one of the Petitioners involved in this proceeding, and sixty other daily newspapers throughout the state of California hold membership in ANPA.

Concerned with matters of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members abreast of matters touching on these concerns. In that regard, the Association's member newspapers, individually and through ANPA, are ever vigilant to protect the public's right, under the First Amendment, to information concerning matters of public interest. ANPA and its members are vitally interested in protecting the public's right to receive, and the right of the press to publish, robust editorial comment and criticism regarding matters of public interest. ANPA therefore is concerned lest the full breadth of the constitutional guarantees of freedom of speech and of the press in the context of libel law not be applied to political cartooning, which historically has been an important means of expressing protected social comment and criticism.

Ever since its 1964 decision in the case of *New York Times Co.* v. *Sullivan,* 376 U.S. 254, the Supreme Court has been caught in what at least one Justice has called a "quagmire in the field of libel," *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 171 (1967) (Black, J., dissenting opinion), seeking to define "the proper accommodation between the law of defamation and the freedoms of speech and press," *Gertz* v. *Welch,* 418 U.S. 323, 325 (1974). This effort began with the adoption of the "actual malice" test, whereby it was held that a public official plaintiff, in order to prevail in a libel action, must show with convincing clarity that the defendant has published a defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not," 376 U.S. 279-280. In 1967 the Supreme Court extended this constitutional

privilege to allegedly defamatory publications relating to "public figures," that is, persons who purposely thrust themselves "into the vortex of an important public controversy." *Curtis Publishing Company* v. *Butts* and *Associated Press* v. *Walker,* 388 U.S. 130, 154 (opinion of JJ. Harlan, Clark, Stewart and Fortas).

In addition to its application of the *New York Times* standard of fault to both defamation of public officials and defamation of public figures, in order "to give effect to the [First] Amendment's function to encourage ventilation of public issues," *Rosenbloom* v. *Metromedia,* 430 U.S. 20, 46 (1971), the Supreme Court has emphasized that before a defendant may be held liable for deliberately, or with reckless disregard, defaming a public figure the published statement must be found to contain false statements of fact, and not mere opinion or ideas expressed through rhetorical hyperbole or figurative epithet. See, *Old Dominion Branch No. 496* v. *Austin,* 418 U.S. 264 (1974); *Greenbelt Cooperative Publisher's Association* v. *Bresler,* 398 U.S. 6 (1970). In the case sought to be presented to this Court by Petitioners, the Court of Appeal of the State of California for the Second Appellate District misapplied the relevant state and federal law in overturning the trial court's grant of Petitioners' Motion for Summary Judgment, and thereby offended the "proper accomodation" between the law of defamation and freedom of the press under the U. S. Constitution.

In the decision herein the Court of Appeal, applying a standard of "possible [defamatory] implication," found the political cartoon in question, which expressed a critical comment and opinion on public issues and public figures, to give rise to a defamatory implication

which, in fact, is directly contrary to the factual imputation contained in the written caption of said cartoon.

In addition, the Court of Appeal completely ignored the insufficiency of Respondent's evidence to show actual malice on Petitioners' part, and reversed the grant of summary judgment merely because Petitioners failed to demonstrate a factual basis for what the court deemed a "possible [defamatory] implication." This of course is erroneous and contrary to the requirements under *New York Times* since even assuming, arguendo, that the cartoon both conveys a factual inaccuracy and injures Respondent's reputation, Respondent still is required to show by "clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for truth." *Gertz* v. *Welch,* 418 U.S. 323, 342 (1974).

Finally, the decision of the Court of Appeal to reverse the grant of summary judgment in this proceeding adds to the confusion and conflict among the various states and lower federal courts as to the role of summary judgment in expediting the disposition of libel actions on their merits. Various jurisdictions, mindful that even the threat of costly litigation and defense against sham libel claims may be chilling to the exercise of First Amendment freedoms, approve the grant of summary judgment in libel actions. See, *Guam Federation of Teachers, Local 1581, A. F. T.* v. *Ysrael,* 492 F.2d 438, 441 (9th Cir. 1974); *Treutler* v. *Meredith Corp.,* 455 F.2d 255, 257 (8th Cir., 1972, per Hunter, J.); *Time, Inc.* v. *Johnston,* 448 F.2d 378 (4th Cir., 1971); *Bon Air Hotel, Inc.* v. *Time, Inc.,* 426 F.2d 858 (5th Cir., 1970); *Wasserman* v. *Time, Inc.,* 424 F.2d 920 (D. C. Cir., 1970) [concurring opinion]; *Buchanon* v. *Associated Press,* 398 F. Supp. 1196 (D.C.D.C. 1975);

Guitar v. *Westinghouse Electric Corp.*, 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975); *Meeropol* v. *Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974); *Cardillo* v. *Doubleday & Co.*, 366 F. Supp. 92 (S.D.N.Y. 1973); *LaBruzzo* v. *Associated Press*, 353 F. Supp. 979 (D.C. Mo. 1973); *Konigsberg* v. *Time, Inc.*, 312 F. Supp. 848 (S.D.N.Y. 1970); *Cerrito* v. *Time, Inc.*, 302 F. Supp. 1071 (N.D. Col. 1969); *Belli* v. *Curtis Pub. Co.*, 25 Cal. App. 3d 834 (1972).

In contrast, a substantial number of jurisdictions expressly disfavor summary judgment where the issue of malice—which calls a defendant's state of mind into question—is raised. See, *Ragano* v. *Time, Inc.*, 302 F. Supp. 1005, 1010 (D.C. Fla. 1969) (per Krentzman, J.), affirmed 427 F.2d 219 (5th Cir. 1970); *Goldwater* v. *Ginzburg*, 261 F. Supp. 784, affirmed following decision on the merits, 414 F.2d 324 (2nd Cir. 1969), cert. den. 396 U.S. 1049; *Fignole* v. *Curtis Pub. Co.*, 247 F. Supp. 595 (S.D.N.Y. 1965); cf. *Poller* v. *C.B.S., Inc.*, 368 U.S. 464 (1962). The disagreement among the various state and federal courts over whether the news media, as defendants in literally thousands of libel actions, may appropriately seek and obtain disposition of these actions by means of summary judgment on the issue of actual malice, cries for the input and guidance of this Court.

Therefore a decision from this Court, delineating more fully the burdens of proof to which, in a libel action, the respective parties in a motion for summary judgment are to be held, and clarifying for emphasis the distinction between the dual requirements under *N. Y. Times*—i.e., a showing of (1) both falsity and injury to reputation, and (2) clear and convincing proof of actual malice—can eliminate the chill on the

exercise of First Amendment freedoms caused by the practical requirement in libel actions in many jurisdictions that the press either offer settlement or be called to defend at trial, due to the relative unavailabiilty of summary judgment.

Because of the importance of the issues sought to be presented to this Court by the Petition for Writ of Certiorari, ANPA desires to present to the Court, for its assistance, its view on the important matters in this proceeding.

WHEREFORE, American Newspaper Publishers Association respectfully requests this Court to grant this motion and permit them to file the Brief Amicus Curiae attached hereto and submitted herewith.

Respectfully submitted,

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v.

FRED L. HARTLEY, *Respondent*

BRIEF OF AMICUS CURIAE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") submits this brief amicus curiae in support of Defendants Paul Conrad, The Times Mirror Company, Los Angeles Times, Otis Chandler, Anthony Day, in their Petition for Writ of Certiorari.

INTEREST OF THE AMICUS CURIAE

The Los Angeles Times and sixty other daily newspapers published throughout the state of California hold membership in ANPA. Concerned with issues of general significance to the profession of journalism and the daily newspaper publishing business, ANPA seeks to keep its members abreast of matters touching on these concerns. In that regard, the Association's member newspapers, individually and through the ANPA, are ever vigilant to protect the public's right under the First Amendment to information concerning the activities of government and matters of public interest.

The decision of the Court of Appeal of the State of California for the Second Appellate District in this cause of action constitutes another example of judicial misapplication of the legal principles regarding the scope of traditionally privileged fair comment and the qualified constitutional privilege extended to publications in cases involving the defamation of public officials or public figures, so painstakingly set forth by this Court in *New York Times* and its progeny. It cannot be denied that, inasmuch as the California Court of Appeal's decision under challenge herein merely reversed the trial court's grant of summary judgment, were this Court to refuse to accept and consider the substance of Petitioner's claims, Petitioner would not necessarily be precluded thereby from ultimately prevailing in the underlying libel action. The decision of the Court of Appeal, however, does injury to the free exchange of ideas and opinion countenanced by the First Amendment far more serious than merely requiring Petitioners herein to go to trial and defend against Respondent's claim, as costly and time

consuming as that may be. Rather, the Court of Appeal's decision involves a fundamentally invalid interpretation of legal principles forged in the substantive law of libel. Moreover, it becomes another in a substantial number of decisions wherein summary judgment, either expressly or by implication, has been disfavored and has been eroded as a practical means of resolving libel actions on the merits.

It is the hope of ANPA that a definitive decision by this Court reimposing summary judgment in this case, where it so clearly is warranted, and reaffirming the elements of proof under the *New York Times* standards which must be shown by a plaintiff in order to successfully maintain a libel action in the face of a defendant's motion for summary judgment, will halt the steady encroachment on the availability of summary judgment as a just means for summary disposition of libel claims wherein no disputed questions of fact exist. Because of the importance of this issue to ANPA, its members, and all persons who, through comment and critical discussion on issues of public significance, run the risk of being put to the defense in a libel action, ANPA desires to present to this Court, for its assistance, its views in regard to the important issues involved in this proceeding.

ARGUMENT

At the outset it must be pointed out that ANPA strongly supports and adopts the position of Petitioners herein. ANPA believes that the Petitioners' brief accurately and forcefully sets forth the background of this case, delineates the errors and misinterpretations of constitutional dimension contained in the opinion of the California Court of Appeal for the Second Ap-

pellate District, and persuasively presents legal reasoning and authority demonstrating the First Amendment protections which the Petitioner should have been accorded in the appeal proceeding below.

ANPA wishes to emphasize that grave errors have been committed by the California Court of Appeal in analyzing and ruling on significant issues related to the substantive law of libel. The court's well-intentioned but misguided concern that Respondent's claim be given a full and fair hearing on the merits has effectively annulled the Constitutional protections owed to the defendant under *N. Y. Times* v. *Sullivan* and its progeny.

The Standard Employed by the California Court of Appeal To Determine that Petitioners' Cartoon Was Defamatory in Nature Offends Both the Relevant Law of the State of California and the Constitutional Standards Enunciated in Greenbelt Coop. Pub. Ass'n v. Bresler and Old Dominion Branch No. 496 v. Austin

The major portion of the California appeal court's opinion below is devoted to the application of *MacLeod* v. *Tribune Pub. Co.*, 52 Cal. 2d. 536 (1959), to the present case. Therein, the Court discussed which standard is applicable in analyzing the threshold issue in every libel action—vis., whether the publication, by its terms, is defamatory in nature. The Court focused its reliance on a faulty interpretation of *MacLeod* v. *Tribune Pub. Co., supra,* and failed to consider federal constitutional libel law which, in view of the appeal court's acknowledgment of Hartley as a "public figure," clearly pre-empts state law. See, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *Greenbelt Coop. Pub. Ass'n* v. *Bresler,* 398 U.S. 6 (1970); *Associated Press* v. *Walker* and *Curtis Pub. Co.* v. *Butts,* 388 U.S. 130

(1967); *Cepeda* v. *Cowles Magazines,* 392 F.2d 417 (9th Cir. 1968).

The court interpreted the holding of *MacLeod* to mandate denial of summary judgment where a publication may reasonably be held to "contain *a possible defamatory meaning* when viewed by the eyes of the average reader." Petitioners' Appendix A, p. 3; (emphasis added). Under the guidance of this spurious interpretation of *MacLeod,* the Court held that it could not as a matter of law find the Respondent was not defamed. This judgment was made, however, despite the fact that the court was unable to find in the political cartoon in question a single false statement of fact, which clearly is required under federal libel law. The only "fact" stated in the cartoon was its caption, wherein the federal government was accurately charged with responsibility for diverting 500,000 barrels of Union Oil's crude from Southern California to Guam. Nevertheless the court pointed out that in view of the fact that the "general tone of the cartoon" was not charitable toward Respondent and the cartoon actually invited persons to "think the worst" of Respondent, there may be certain viewers who nevertheless would construe the cartoon to charge Respondent with responsibility for the diversion order. Petitioner's Appendix A, p. 6.

Such a tortured interpretation of the cartoon and the utilization of a "possible [defamatory] implication" standard to reverse the trial court's grant of summary judgment below patently ignores the relevant state and federal law in respect of the defamatory nature of false ideas, critical opinions, and rhetorical hyperbole.

Turning first to a California state case, *Yorty* v. *Chandler,* 13 Cal. App. 3d 469 (1970), the court there makes it clear that where an allegedly defamatory publication contains rhetorical hyperbole or patently exaggerated epithets, and the reader may reasonably be held to discern it as such, liability will not lie, despite the fact that the possibility of a defamatory construction may still exist:

> "Because a political cartoon presents critical opinion in imaginative and symbolic form, in claimed instances of defamation a court must ferret out the underlying themes of the cartoon and then determine whether these can *reasonably* be considered libelous. [citations omitted]"

13 Cal. App. 3d. at 472; (emphasis added).

In that case, the mayor of Los Angeles had been lampooned for his publicly expressed aspirations for a cabinet appointment by means of a political cartoon depicting Mayor Yorty at his office desk talking on the telephone while four white-coated medical attendants with concerned expressions on their faces stood around him. One orderly was holding a strait jacket behind his back while another was beckoning the mayor with his finger. The caption read, "I've got to go now . . . I've been appointed Secretary of Defense and the Secret Service men are here!" In holding that this cartoon did not impute mental instability or insanity on the mayor's part and that the cartoon was not defamatory, the court reasoned:

> "[E]ven the most careless reader must have perceived that the cartoon was no more than rhetorical hyperbole, a vigorous expression of opinion by those who considered Mayor Yorty's aspiration for high national office preposterous. To

> penalize defendants for publishing this political cartoon would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments.
>
> * * *
>
> We conclude that under both state and federal law the trial court correctly determined that the cartoon was not *reasonably susceptible to a defamatory meaning* and that consequently plaintiff had failed to state a cause of action."

13 Cal. App. at 477; (emphasis added).

To require that a publication, in order to be deemed defamatory, be "reasonably susceptible" to such a meaning, clearly affords significantly greater protection to the expression of critical comment on matters of public importance than does the requirement that a publication merely contain a "possible [defamatory] implication."

Not only is the California Court of Appeal's adoption of a "possible [defamatory] implication" standard at odds with the relevant state law of California; under various decisions handed down by this Court, it clearly is impermissible as a matter of constitutional law. See, *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974); *Old Dominion Branch No. 496* v. *Austin,* 418 U.S. 264 (1974); *Greenbelt Coop. Publ. Ass'n* v. *Bresler,* 398 U.S. 6 (1970).

In *Gertz,* this Court emphasized the distinction between constitutionally protected expressions of opinion and false statements of fact:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem we depend for its correction

> not in the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact."

41 L.Ed.2d at 805.

In *Old Dominion Branch No. 496,* a companion decision to *Gertz,* plaintiffs were accused in the course of a labor dispute of having "rotten principles," of "lacking character," and of being "traitors." In overturning a libel judgment against the defendants, the Supreme Court held:

> "Before the test of reckless or knowing falsity can be met, there must be a false statement of fact. *Gertz* v. *Robert Welch, Inc.,* 418 U.S. at 339-340.
>
> * * *
>
> "The . . . use of words like 'traitor' cannot be construed as representations of fact. As the Court said long before *Linn,* in reversing a state court injunction of union picketing, 'to use loose language or undefined slogans that are part of the conventional give and take in our economic and political controversies—like 'unfair' or 'fascist' —is not to falsify facts.' [Citation]. Such words were obviously used herein in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. Expression of such an opinion, even in the most perjorative terms, is protected under federal labor law.

41 L.Ed.2d at 761-762.

In *Greenbelt Coop. Pub. Ass'n.,* the Court held that there could be no recovery based on the use of the word "blackmail," because it was clear from the context that the word was no more than "rhetorical hyperbole, a vigorous epithet" intended as criticism of the plaintiff's "public and wholly legal negotiating proposals."

26 L.Ed.2d at 15; cf. *Buckley* v. *Littel,* 394 F. Supp. 918 (1975).

In *Fram* v. *Yellow Cab Company,* 380 F. Supp. 1313 (1975), the United States District Court for the Western District of Pennsylvania granted summary judgment to the defendant—who on television had characterized plaintiff's public comments as similar to "the sort of paranoid thinking you get from a schizophrenic"—because the "typical" or "average" viewer would recognize said statement to be rhetorical hyperbole.

Similarly, in the libel action *Sellers* v. *Time, Inc.,* 423 F.2d 887 (1970), the U.S. Court of Appeals for the Third Circuit affirmed a grant of summary judgment and based its analysis on whether "the language used in the objectionable article could *fairly and reasonably be construed to*" defame. 423 F.2d at 890; (emphasis added). The court also expressly focused its attention "on the impact of the publication *on the average reader of TIME.*" Id., at 891; (emphasis added).

The federal law and the law of the state of California have firmly established, as applied to the facts underlying this action: (1) that any reference to Respondent as heartless—although an adverse characterization of Respondent's personality—is an exaggerated expression of opinion, rather than a statement of fact, and is therefore protected, *Yorty* v. *Chandler, supra; Correia* v. *Santos,* 191 Cal. App. 2d. 844 (1961); *Gertz* v. *Welch, supra; Greenbelt Coop. Pub. Ass'n.* v. *Bresler, supra; Old Dominion Branch No. 496* v. *Austin, supra;* and (2) that any implication contained in the cartoon suggesting that Respondent was responsible for the order to divert oil to Guam—despite the car-

toon caption's accurate attribution of responsibility for said order to the federal government—must be "measured, not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader [citation]." *MacLeod* v. *Tribune Pub. Co. Inc.*, 52 Cal.2d. 536, 543 (1959). See also *Scott* v. *McDonnell Douglas Corp.*, 37 Cal. App. 3d. 277 (1974); *Yorty* v. *Chandler, supra;* Restatement (First) of Torts § 569, comment d (1938); *Greenbelt Coop. Pub. Ass'n* v. *Bresler, supra; Sellers* v. *Time, Inc., supra.*

Thus the legal analysis and, your *amicus* submits, the decision of the California Court of Appeal with respect to the defamatory nature of the political cartoon in question is clearly erroneous. The Court has employed a definitional standard of defamation which can apply to almost any statement of criticism, no matter how exaggerated, facetious or metaphorical. Clearly the press cannot be expected to perform its constitutionally protected function of vigorously disseminating news and other information to the public when faced with the prospect of liability for defamation on such an attentuated basis as "a possible [defamatory] implication."

The Court of Appeal Committed Error of Constitutional Dimension by Reversing the Trial Court's Grant of Summary Judgment Without Making Any Determination of "Actual Malice" on the Part of Petitioners

Under the New York Times standard regarding defamation of public officials—since applied to public figures, such as the Court of Appeal conceded Respondent to be—a plaintiff may not successfully maintain an action for defamation unless he raises triable issues

of fact regarding two material elements of proof: (1) that the publication was defamatory in nature; and (2) that the defendant acted either with knowledge of falsity or a reckless disregard for truth. The quality of the evidence required to raise a triable issue of fact as to "actual malice" is set forth in *Cervantes* v. *Time, Inc.*, 464 F.2d. 986 (8th Cir. 1972). There the court affirmed a summary judgment for the defendant, noting that the plaintiff had failed in his obligation "to *demonstrate with convincing clarity* that either defendant acted with knowing or reckless disregard for truth." *Id.* at 992, emphasis supplied. See also *Field Research Corp.* v. *Patrick*, 30 Cal. App. 3d. 603, 608 (1973).

The Court of Appeal below patently failed to apply the twofold requirement of the *New York Times* rule. As already discussed above, the Court erroneously ruled that it could not, as a matter of law, hold Petitioner's cartoon to be nondefamatory. Yet even assuming, *arguendo,* that the cartoon did contain false statements of fact which would reasonably tend to injure Respondent's reputation, only one of the two necessary elements of liability is established. It still must be shown that Petitioners acted with knowing or reckless disregard for truth. And the affidavits of Petitioners, uncontradicted by the Respondent, show that at no time did Petitioners act with knowing or reckless disregard for truth.

In its opinion, the California Court of Appeal spends one paragraph setting forth the applicable law under *New York Times* v. *Sullivan, et seq.,* and only one sentence applying said law to the facts herein:

> "While Respondents made a strong showing of the basis for their charge that appellant's re-

> fusal to allocate the shortfall caused a bleak Southern California Christmas, negating reckless regard [sic] of the truth or knowledge of falsity in that respect, they made no effort to demonstrate that there was any basis for a charge that appellant was in some way responsible for causing the diversion order."

Petitioners' App. A, pp. 8-9.

In effect the Court has turned *New York Times* around, by reasoning that since Petitioners failed to demonstrate some factual basis for implying that Respondent was responsible for the diversion order—an implication which Petitioners claim does not even exist in the cartoon—Respondent has raised a triable issue of fact as to whether Petitioners acted with actual malice. In fact Respondent has failed to allege any culpable conduct on Petitioners' part which would exceed "common law malice" (i.e., hatred, spite, etc.) or negligence, both of which are insufficient under *New York Times.*

Although a defendant's inability, if thoroughly tested, to demonstrate any factual basis for his defamatory statement may reflect upon his competence and/or good will, it is not "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson,* 390 U.S. 727, 731 (1968). Furthermore, it is evident beyond peradventure that the constitutional privilege established under *New York Times* is not overcome by proof of negligence, *Garrison* v. *Louisiana,* 379 U.S. 64, 79, (1964); ill will, *Beckley Newspapers* v. *Hanks,* 389 U.S. 8 (1967); or intent to inflict harm, *Henry* v. *Collins,* 380 U.S. 356 (1965).

Your *amicus curiae* respectfully wishes to emphasize that by equating the Petitioners' failure to demonstrate a factual basis for an allegedly defamatory interpretation of their political cartoon, which they have felt at all times cannot reasonably be made, with knowledge or disregard for the cartoon's defamatory nature is clearly reversible error.

The Lower Court's Disapproval of Summary Judgment in This Action Undermines a Very Necessary Means of Avoiding Unnecessary Libel Trials Which Put a Chill on the Exercise of First Amendment Rights

Although Petitioners may ultimately vindicate by means of a directed verdict their assertion that Respondent has failed to raise triable issues of material fact which would sustain a verdict of liability, the lower court's reversal of summary judgment raises concerns of far greater significance than the time and expense which will be required of Petitioners in fully litigating this action.

For the burden of proof required of a plaintiff, under the erroneous standards employed by the California Court of Appeal, in order to raise a triable issue of fact as to a publication's defamatory content and the presence of "actual malice" is so lenient as to negate substantially the special protection afforded to libel defendants under *New York Times* and severely limit the availability to a defendant of summary judgment. As a result, those persons who legitimately exercise their First Amendment right to publish critical comment on matters of public interest involving public figures or public officials, if sued within the Second Appellate District of California, may expect to face costly discovery and trial on even unfounded allegations of defamation raised by a libel plaintiff, unless

a compromise settlement can be reached. The effect thereof upon publishers dedicated to the legitimate expression of critical or unpopular social comment would be devastating.

The sheer volume of published material in this country has steadily increased. The newspaper profession has grown in both size and, due to an increased emphasis upon investigative reporting and advocacy journalism, in its impact upon public opinion. It also may be supposed that as Americans grow more numerous, as their relations with one another become more complex, and as they find themselves less able to reach their potential and goals in life solely on the basis of their individual efforts, their estimate of the worth of their reputational interests will increase. Against this background, the volume of libel suits brought and the size of damage awards in libel actions has increased dramatically in the 1960's and early 1970's, 1 A. Hanson LIBEL AND RELATED TORTS (pt. vii) (1969); Murnaghan, "From Figment to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions", 22 Catholic University Law Review 1 (1972). This trend and the well-recognized fact that the threat of being put to the defense in a libel action may result in self-censorship that is chilling to the exercise of First Amendment freedoms should be of grave concern to all citizens generally and to this Court in particular. See *Dombrowski* v. *Pfister,* 380 U.S. 479, 487 (1965); *NAACP* v. *Button,* 371 U.S. 415, 432 (1963).

Yet regardless of the substantive threat to free speech posed by unfounded civil libel actions, many courts expressly disfavor summary judgment, particularly on issues such as "actual malice" which involve a defendant's state of mind. See *Ragano* v. *Time, Inc.,*

302 F. Supp. 1005, 1010 (D.C. Fla. 1969), affirmed 427 F.2d 324 (2nd Cir. 1969), cert. den. 396 U.S. 1049; *Fignole* v. *Curtis Pub. Co.,* 247 F. Supp. 595 (D.C. N.Y. 1965); *cf., Poller* v. *C.B.S. Inc.,* 368 U.S. 464 (1962); Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 2712, fn. 54 (1973).

Your *amicus* respectfully wishes to emphasize that Respondent has failed to raise a genuine issue of fact bearing on the question whether Petitioners herein published with knowing or reckless disregard for truth. Petitioners therefore are entitled to judgment now and should not be put to the burden and expense of litigating this action. In the Second Appellate District of California as well as the rest of the United States, "[s]ummary judgment serves important functions which would be left undone if courts too restrictively viewed their power. * * * In the First Amendment area, summary procedures are even more essential." *Washington Post Co.* v. *Keogh,* 365 F.2d 965, 967-968 (U.S. App. D.C. 1966), cert. den., 385 U.S. 1011. ANPA therefore urges this Court to reaffirm the very necessary role summary judgment plays in the summary disposition of unfounded libel actions alleging defamation of public figures and public officials.

CONCLUSION

Your *amicus* has attempted to elucidate for this Court the very significant First Amendment issues surrounding the California court's decision below. The constitutional infirmity of that decision is evident. ANPA recognizes, however, that this Court may be inclined to reject the Petition herein because Petitioners may ultimately prevail on their claim of privilege by means of a directed verdict or favorable ver-

dict from the jury at trial. Your *amicus* respectfully requests this Court to resist that inclination. To uphold or refuse to consider the reversal of summary judgment in this matter, which would result in expensive and time consuming litigation, can only serve to cause uncertainty and timidity in those who, through political cartoonists, employ symbolism and caricature to express meaningful social comment and criticism. It would contribute to an atmosphere in which the open, uninhibited and robust exercise of First Amendment freedoms cannot long survive.

For the reasons stated herein it is respectfully urged that this Court grant the Petition for Writ of Certiorari in order that the substantial constitutional questions raised therein can be fully examined.

Respectfully submitted,

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